

State of Minnesota

Department of Human Services

Report of the

Task Force on

**Reform of Rules and
Regulations Affecting
Services to Person with
Developmental Disabilities**

March 1992

By the

Commissioner of Human Services

Report of the Task Force on

Reform of Rules and Regulations
Affecting Services to Persons with
Developmental Disabilities

Prepared by

Minnesota Department of Human Services

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Introduction

INTRODUCTION

The 1991 Legislature directed the Commissioner of Human Services to convene an advisory council to examine the rules governing facilities certified as intermediate care facilities for persons with mental retardation or related conditions and to submit to the Legislature a plan for simplification of rules and regulations governing services to persons with developmental disabilities. The advisory council convened by the Commissioner was referred to as the Developmental Disabilities Reform Task Force.

The following report comprises the findings and recommendations of the Developmental Disabilities Reform Task Force. The six recommendations presented in this report reflect a general consensus of the task force. This report consists of a presentation of the recommendations of the task force followed by a brief discussion of the issues and an analysis of the feasibility of each respective recommendation.

It should be noted that in addition to the recommendations of the Developmental Disabilities Reform Task Force, during the past year the Department has made other significant efforts in the area of regulatory reduction that will likely also serve to simplify the regulation of services to persons with developmental disabilities. Examples of such efforts include: 1) the implementation of demonstration projects to explore alternative forms of case management services to persons with developmental disabilities, as authorized under Minnesota Statutes 1991, section 256B.0925; and 2) the review of administrative requirements pursuant to Minnesota Statutes 1991, section 256E.05, which provides that the Commissioner may review social services administration rule requirements and adopt amendments under chapter 14 to reduce administrative costs and complexity by eliminating unnecessary or excessive paperwork, simplifying or consolidating program requirements, or emphasizing outcomes rather than procedures.

The Department of Human Service has not completed a detailed fiscal analysis of the recommendations of the task force. However, it is clear that implementation of a number of these recommendations may have a significant impact on the Department.

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Background

BACKGROUND

Minnesota Statutes 1990, section 245A.17, required the commissioners of the Department of Health and the Department of Human Services to submit to the 1991 Legislature, a plan for the simplification of rules and regulations governing services to persons with developmental disabilities or related conditions. This bill was sponsored by Senator Jim Vickerman and Representative Roger Cooper. Pursuant to this legislation, a task force was convened and preliminary recommendations were made to the Legislature during the 1991 session. The recommendations were preliminary in nature due to a premature suspension of task force efforts based on impending litigation against the Department of Human Services.

Laws of Minnesota 1991, chapter 318, required the Commissioner of Human Services to convene an advisory council to examine the rules governing facilities certified as intermediate care facilities for persons with mental retardation or related conditions and to submit to the Legislature, by January 1992, a plan for simplification of rules and regulations governing services to persons with developmental disabilities or related conditions. This bill was presented by Representative Cooper.

In Minnesota, services to persons with developmental disabilities have changed significantly over the past 20 years, with most persons now receiving services and supports in community-based settings. These services vary in nature and level of restrictiveness, and include regional treatment centers, community group homes, in-home support services, family subsidy, and day training and habilitation services. Other forms of support services include case management and a variety of social services offered through county agencies.

Over the years, a number of rules governing services to persons with developmental disabilities have been promulgated by the Department of Human Services. These regulations have been primarily of a service, reimbursement or administrative orientation. However, because the service delivery system for persons with developmental

disabilities is continually evolving, the system has a number of regulations which are reflective of this evolution. As a result, these rules at times "outdate" one another. The focus of the task force has been on efforts to reduce regulation of services to persons with developmental disabilities by targeting program rules, which have been identified as containing the highest degree of similarity. These specific department rules are identified in recommendation number four of this report.

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Methodology

METHODOLOGY

In June 1991, a task force was formed which was comprised of 24 members. All members of the original task force convened in 1990 were given the opportunity to serve on the task force. A list of Developmental Disabilities Task Force members is attached as Appendix II. The composition of the task force was diverse, including representation of service providers, county human services agencies, parents, advocacy groups, the Health Department, and the Department of Human Services, Divisions of Licensing, Developmental Disabilities, and Rules. Additional interested persons, including service providers and advocacy groups, also attended a number of the task force meetings. In addition to convening the task force, the Department of Human Services also encouraged task force members to solicit input from their constituents for consideration in the development of this plan.

A total of four task force meetings were held. The task force met for the first time on July 11, 1991. The focus of the first meeting was to develop a work plan and strategy for proceeding with the formation of the plan for simplification and reform. The scope of the plan was agreed upon and four subcommittees were formed to address areas identified as requiring research and analysis. The four subcommittees were to address the following areas: 1) Rules 34 and 80; 2) Rules 18, 38, and 42; 3) one service principle rule for developmental disabilities; and 4) interpretive guidelines. The subcommittees met during July and August.

A second task force meeting was held on August 26, 1991. At this meeting, the first subcommittee gave its report. This report compared Rule 34 and the federal ICF/MR regulations with respect to the areas of duplication as well as the distinctive requirements of each. The other three subcommittees gave status reports.

The next task force meeting was held on September 30, 1991. At this meeting, reports were given by the following three subcommittees: 1) Rules 18, 38, and 42 (Non-residential subcommittee); 2) one service

principle rule; and 3) interpretative guidelines. The task force also discussed the issue of whether a single state agency should have jurisdiction over ICF/MR facilities.

A fourth task force meeting scheduled for November 4, 1991 was canceled due to inclement weather. The final meeting of the task force was held on December 2, 1991. Members were requested to respond to a draft outline of the proposed plan, which had been submitted to them in preparation for the meeting. A general consensus was reached on the six recommendations contained in this report. A draft of the final report was sent to task force members in December for review and requesting any additional written input.

The recommendations that follow are the body of the report. The following supporting documentation is contained in the attached appendices: the language of the authorizing legislation, a list of task force members, summaries of the four task force meetings, a list of subcommittee membership, and a summary of the recommendations of each subcommittee, an analysis of the implications of the use of interpretative guidelines under the Administrative Procedure Act, and draft proposed legislation.

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Executive Summary

EXECUTIVE SUMMARY GENERAL RECOMMENDATIONS OF THE TASK FORCE

- ▶ Amend Minnesota Rules, parts 9525.0215 to 9525.0355 (Rule 34), which governs the licensure of intermediate care facilities for persons with mental retardation or related conditions, to eliminate all standards that are duplicative of federal ICF/MR standards.

- ▶ Pursue the development of outcome-based standards

- ▶ Pursue consolidation and coordination of the Departments of Health and Human Services review and enforcement standards applicable to intermediate care facilities for persons with mental retardation or related conditions.

- ▶ Develop a single rule for developmental disabilities program standards.

- ▶ Pursue implementation of a technical assistance pilot project.

- ▶ Seek legislative approval for an extension to the time frame for completing the Re-determination of Need review by the county of existing service providers.

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Recommendations

RECOMMENDATION #1

AMEND MINNESOTA RULES, PARTS 9525.0215 TO 9525.0355, TO ELIMINATE DUPLICATIVE REQUIREMENTS.

Laws of Minnesota 1991, chapter 318, specifically directed the task force to address simplification and elimination of duplication in rule parts governing intermediate care facilities for persons with mental retardation or related conditions. Accordingly, one of the primary tasks of the Developmental Disabilities Reform Task Force was to carefully compare and analyze parts 9525.0215 to 9525.0355 and the federal regulations governing the certification of intermediate care facilities for persons with mental retardation or related conditions. After close examination of the recommendations of the task force, the Department of Human Services recommends amending parts 9525.0215 to 9525.0355 in order to eliminate all requirements which are duplicative of requirements contained in the federal intermediate care facility (ICF/MR) regulations.

Specifically, the Department recommends that a rule advisory committee be convened by May 1992. Selected members of the Developmental Disabilities Reform Task Force shall be invited to participate on the advisory committee. The analysis conducted and findings obtained by the subcommittee of the task force should serve as a basis for the advisory committee's work.

With respect to process, the Department recommends that those requirements contained in parts 9525.0215 to 9525.0355 which have been identified as clearly duplicative of the federal ICF/MR standards should be handled as non-controversial amendments in order to expedite the process. Notwithstanding this recommendation, the task force does recognize that it is likely that there may be certain proposed amendments to parts 9525.0215 to 9525.0355 which will be viewed by some members of the public as controversial in nature.

Accordingly, based on the recommendations of the task force, the Department further recommends proceeding with those amendments considered to be controversial on a separate rule amendment track. This recommendation is justified on the basis that proceeding with the non-controversial amendments separately will facilitate a more timely elimination of duplicative standards, in keeping with the intent of chapter 318.

RECOMMENDATION #2:

DEVELOPMENT OF OUTCOME BASED STANDARDS ACCOMPANIED BY SUPPORTIVE GUIDANCE.

Based on the recommendations of the Developmental Disabilities Reform Task Force, the Department strongly recommends pursuing the development of outcome-based standards. There was a general consensus of the task force that current attempts to evaluate service effectiveness by detailed rule-based process monitoring are not highly successful. The Department recognizes the need to focus on more actual outcomes for the persons receiving services.

The Department also agrees to evaluate the need for and use of interpretative guidelines as well as the provision of training, technical assistance and manual material to better support programs in achieving desired outcomes.

The task force recommended that the Departments of Human Services and Health work cooperatively to pursue the option of developing outcome-based standards. In suggesting the use of interpretative guidelines, the task force recognized that a legislatively-approved exemption to the Administrative Procedure Act (Minnesota Statutes, chapter 14) may be required, based on the legal implications of the use of interpretative guidelines by a state agency (See Appendix VI attached).

The recommendation of the task force to pursue the use of interpretative guidelines initially on a demonstration project basis reflects the concern expressed by a number of task force members that caution should be exercised in pursuing changes to the Administrative Procedure Act. It is the position of the task force that the goal of using interpretative guidelines should be to facilitate the delivery of state-of-the-art services to persons with developmental disabilities.

RECOMMENDATION #3:

CONSOLIDATION OF REVIEW AND ENFORCEMENT OF STANDARDS APPLICABLE TO INTERMEDIATE CARE FACILITIES FOR PERSONS WITH MENTAL RETARDATION OR RELATED CONDITIONS.

The Department of Human Services recommends working with the Department of Health to explore means to consolidate and coordinate the review and reinforcement functions related to standards governing ICF/MR facilities.

The Developmental Disabilities Reform Task Force suggested that the Departments of Human Services and Health pursue a means to consolidate and coordinate review and enforcement of standards applicable to intermediate care facilities for persons with mental retardation or related conditions (ICF/MRs).

During the task force process, there was a great deal of discussion around the issue of consolidating the monitoring of ICF/MR facilities as a means of reducing duplication. In particular, ARRM representatives suggested that the review of ICF/MRs should be conducted by a single state agency and recommended that the Health Department should have sole jurisdiction. There were a number of task force members that strongly disagreed with this suggestion, in particular advocates for persons with developmental disabilities. It was the position of the advocates that the expertise in the area of developmental disabilities contained in the Department of Human Services is essential to adequate monitoring. At the urging of the task force, the issue of agency jurisdiction of ICF/MR facilities was presented to both the commissioners of the Departments of Human Services and Health.

RECOMMENDATION #4:

DEVELOPMENT OF A SINGLE RULE FOR DEVELOPMENTAL DISABILITIES PROGRAM RULES.

The Developmental Disabilities Reform Task Force recommended that the Department of Human Services develop a single program rule which governs the licensure of services to persons with developmental disabilities.

Specifically, the task force suggested that this rule be developed by consolidating current developmental disabilities licensing rules into one rule which would contain subpart/provisions specific to each type of service. A number of task force members stressed the importance of maintaining the uniqueness and integrity of the different types of services by including separate provisions for those standards that are unique to each service. Task force members agreed that the objective of such a single rule would be to consolidate standards applicable to services to persons with developmental disabilities in order to streamline requirements and reduce duplication.

A subcommittee was formed to specifically study the concept of one developmental disabilities service rule. In addition, two other subcommittees analyzed duplication of standards in five developmental disabilities rules (see attached Appendix V). Based on the findings of the subcommittees, the task force recommends that the following current rules be consolidated into one rule which will govern services to persons with developmental disabilities:

- 1) Parts 9525.0500 to 9525.0660 (Rule 18)-Semi-Independent Living Services to Persons with Mental Retardation or Related Conditions;
- 2) Parts 9525.0215 to 9525.0355 (Rule 34)-Residential Programs and Services for Persons with Mental Retardation or Related Conditions;

3) Parts 9525.1500 to 9525.1690 (Rule 38)-Licensure of Training and Habilitation Services for Persons with Mental Retardation or Related Conditions;

4) Parts 9525.2000 to 9525.2140 (Rule 42)-Licensure of Home and Community-Based Services for Persons with Mental Retardation or Related Conditions; and

5) Parts 9570.2000 to 9570.3600 (Rule 80)-Residential Facilities and Services for the Physically Handicapped.

The Department recommends that a rule advisory committee be convened by September 1, 1992, to begin work on the development of this single rule. The Department agrees to obtain additional public input on this important effort through conducting several regional public informational meetings.

RECOMMENDATION #5 TECHNICAL

ASSISTANCE PILOT PROJECT.

The Department of Human Services recommends a strengthening of its provision of technical assistance to service providers as an alternative approach to over reliance on negative licensing action.

The Department has developed a technical assistance proposal. The objective of this proposal is to develop an enhanced technical assistance response which will assist providers in achieving compliance while assuring the health and safety of persons receiving services without the disruption and costs associated with current systems for administrative or judicial review.

As suggested by the task force, the Department will test through the use of pilot projects, whether such technical assistance would best be provided by an objective, third-party consultant or by the Department. An outcome of the pilot project will be further recommendations on the most effective technical assistance model and costs.

RECOMMENDATION #6 EXTENSION OF NEED

DETERMINATION TIME LINES.

The Developmental Disabilities Reform Task Force recommended that the Department of Human Services seek a legislatively-approved extension to the time frame for completing the Re-determination of Need review by the county of existing service providers.

The Department is proposing legislation which would extend timelines for re-determination from every two years to every four years.

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Appendix I
Language of the
Authorizing Legislation

DEVELOPMENTAL DISABILITIES—ADVISORY COUNCIL

CHAPTER 318 S.F. No. 1127

AN ACT relating to human services; establishing an advisory council; requiring a plan to simplify rules and regulations governing services to persons with developmental disabilities and related conditions.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. ADVISORY COUNCIL.

By June 15, 1991, the commissioner of human services shall convene an advisory council to examine the rules governing facilities certified as intermediate care facilities for persons with mental retardation or related conditions under Code of Federal Regulations, title 42, parts 431, 435, 442, and 483. The council shall examine the following rules: Minnesota Rules, parts 9525.0215; 9525.0225; 9525.0235; 9525.0243; 9525.0245; 9525.0255; 9525.0265; 9525.0275; 9525.0285; 9525.0295; 9525.0305; 9525.0315; 9525.0325; 9525.0335; 9525.0345; and 9525.0355. The commissioner shall submit to the legislature, by January 1, 1992, a plan for simplification of rules and regulations governing services to persons with developmental disabilities and related conditions. The plan must provide recommendations and draft legislation. The commissioner shall submit

to the legislature an initial interim report by August 15, 1991, and a second interim report by October 15, 1991.

Sec. 2. EFFECTIVE DATE.

Section 1 is effective the day following final enactment. Presented to the governor May 30, 1991.

Approved June 3, 1991.

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Appendix II

Task Force

Members

DEVELOPMENTAL DISABILITIES REFORM
TASK FORCE MEMBERS
and OTHER
PARTICIPANTS

Dave Kiely
A.R.R.M.

Dale Miller
Minnesota Developmental Achievement Center Association (MnDACA)

Kevin Martineau
Minnesota Habilitation Coalition (M.H.C.)

Karen Pate
Commissioner's Task Force on Mental Retardation and Developmental
Disabilities

Donna Hoverman
Homeward Bound

Gerald Glomb
Cooperating Community Programs

Gene Martinez Arc
Minnesota

Anne Henry
Legal Aid Society of Minneapolis

Cindy Yess Arc
Minnesota

Jim Abst
Ramsey County Human Services Dept.

Dennis McCoy
Blue Earth County Human Services

Part Conley
Association of Minnesota Counties

Laurie Simon
Minnesota Social Services Association
Hennepin County Community Services

Linda Sutherland
Minnesota Department of Health

Lynne Megan
R.E.M.

Mary Rodenberg-Roberts
Resident Advocacy Services

Sharon Kannenberg
Home and Community Options, Inc

Suzanne Dotson Licensing
Division-DHS

Jim Loving
Director, Licensing Division-DHS

Cory Graser Licensing
Division-DHS

Shirley Patterson

Director, Division for Persons with Developmental Disabilities-DHS

Bob Meyer

Division for Persons with Developmental Disabilities-DHS

Theresa Mustonen

Division for Persons with Developmental Disabilities-DHS

Laura Plummer

Rules and Bulletins Division-DHS

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Appendix III

Summaries of Task

Force Meetings

DEVELOPMENTAL DISABILITIES REFORM TASK FORCE MEETING MINUTES

JULY 11, 1991 1:00-4:00 P.M. DHS
BUILDING ROOMS 2-A AND 2-B

This was the first meeting of the task force reconvened pursuant to 1991 legislation. The following task force members were in attendance:

Laurie Simon, Hennepin County-MSSA
Dennis McCoy, Blue Earth County-AMC
Gene Martinez, ARC Minnesota
David Kiely, ARRM
Cindy Yess, ARC Minnesota
Anne Henry, Minnesota Disability Law Center
Linda Sutherland, Department of Health
Mary Rodenberg-Roberts, Resident Advocacy Services
Lynne Megan, REM
Suzanne Dotson, DHS-Licensing
Cory Graeser, DHS-Licensing
Jim Loving, DHS-Licensing
Robert Meyer, DHS-DPDD
Theresa Mustonen, DHS-DPDD
Laura Plummer, DHS-Rules

Members were provided with a copy of last year's task force report and the meeting began with an overview of the report.

The next item on the agenda was to review the 1991 legislation which authorizes the task force. The focus of the legislation was discussed in terms of only reviewing Rule 34 versus a broader scope as indicated by the last provision of the legislation. It was agreed that the legislative intent was for a broader plan of reform. The timelines required by statutes were highlighted. An initial interim report is due to the Legislature by August 15, 1991. The content of this plan was discussed and it was agreed that this report will be made in the form

of a progress report and outline of work plan. A second interim report is due to the Legislature by October 15, 1991 and the final task force report is due January 1, 1992.

The next agenda item was to schedule the upcoming task force meetings. It was determined that meetings would be held approximately every six weeks concluding the first of December in order to assure adequate time to complete the final report. A total of four additional task force meetings were scheduled for the following dates and times:

1. Monday, August 26th -----1:00-4:00 p.m.
2. Monday, September 30th—1:00-4:00 p.m.
3. Thursday, November 7th ----- 1:00-4:00 p.m.
4. Monday, December 2nd ----- 1:00-4:00 p.m.

The task force discussion then turned to the scope of the plan itself. The discussion began with a the recommendation for one service principle rule which was recommended by the task force during last year's work. There was a general consensus by members that the one service principle rule should be a major focus of the plan to be developed by the task force. The Department then posed the question of which developmental disabilities rules should be included in the plan. Due to the limited time the task force has to develop a plan, it was determined that the scope has to be limited in order to be workable. First, Rule 34 must be included because it is specifically required by the authorizing legislation. As a starting point, it was suggested that the scope be limited to the DD licensing rules, including Rules 18, 34, 38, 42 and 80. It was pointed out that these since these five rules all license services for persons with developmental disabilities, that they have many common aspects and as such, would lend themselves to some form of consolidation.

Some members suggested that Rules 40 and 185 should also be included in the scope of the plan. The Department responded that since both Rules 40 and 185 are currently being amended, it would not be the most efficient process to address them in both forums. Some members expressed concern that issues that the task force may

deal with during the development of the plan may be related to either Rule 40 or Rule 185 and should be considered during the amendment of these two rules. The Department advised members that certainly concerns relevant to the amendment of Rules 40 or 185 could be passed on to Department staff working on these rule amendments. It was pointed out that in the case of Rule 185 in particular, significant legislative changes were made during the 1991 session which require amendment of the rule and which address many of the concerns previously expressed by those affected by Rule 185. Further, demonstration projects will be conducted regarding Rule 185 and therefore, substantial efforts will be devoted to the area of case management. One member suggested that Laura Doyle of DPDD attend the next task force meeting to give members an overview of the 1991 case management legislation.

Once the scope of the plan was determined, the discussion then turned to the work plan. It was agreed that given the large amount of work to be done that it would be desirable to form subcommittees. After discussing the possible topics for subcommittee work, the task force agreed upon the formation of the following four subcommittees:

1. Service principles: This subcommittee will work on the general service principles and scope applicable to all five of the identified DD licensing rules. This group will also research and study what other states are doing with regard to outcome-based standards for services to persons with developmental disabilities. Volunteers for this subcommittee were: Suzanne Dotson (convener), Lynne Megan and Theresa Mustonen. Task force members also recommended that Karen Pate, as a parent, be included in this subcommittee.

2. Residential rules: This subcommittee will analyze Rules 34 and 80 with respect to duplication and inconsistencies. The following members volunteered to participate: Dave Kiely (convener), Gene Martinez, Cindy Yess, Jim Abst, Mary Rodenberg-Roberts, and Bob Meyer. Members recommended that Linda Sutherland and Karen Pate also be included in this subcommittee

3. Non-residential rules: This subcommittee will analyze Rules 18, 38, and 42 with respect to duplication and inconsistencies. This subcommittee is comprised of the following members: Laurie Simon (convenor), Kevin Martineau, Gerald Glomb, Dennis McCoy, Dale Miller, Roger Deneen, Lynn Megan, Sharon Kannenberg and Laura Plummer.

4. Interpretative guidelines: This subcommittee will look at the use of interpretative guidelines as a means of reducing regulation. Subcommittee members include: Shirley Patterson, Jim Loving, Linda Sutherlund and Pat Connolly.

Each subcommittee is to schedule their respective work meetings to prepare a preliminary report for next month's full task force meeting. The residential subcommittee suggested that residential services be emphasized at the August task force meeting and that they would be prepared with an in-depth report.

The Department will send each subcommittee the rules and materials necessary to begin their analyses. Members who were not in attendance at today's meeting will be sent a copy of the report to the Legislature as well. The meeting was then adjourned.

DEVELOPMENTAL DISABILITIES REFORM TASK FORCE
MEETING MINUTES AUGUST 26,
1991 1:00-4:00 P.M.

This was the second meeting of the task force reconvened pursuant to 1991 legislation. The following members attended:

Anne Henry, Minnesota Disability Law Center
Kevin Martineau, Minnesota Habilitation Coalition
Gerald Glomb, Cooperating Community Programs
Linda Sutherland, MN Department of Health
Lynne Megan, REM/ARRM
David Kiely, ARRM
Jim Abst, Ramsey County
Patricia Conley, Association of Minnesota Counties
Laurie Simon, MSSA
Cindy Yess, ARC Minnesota
Katherine Finlayson, ARC Minnesota
Donna Hoverman, Homeward Bound, Inc.
Theresa Mustonen, DHS-DPDD
Suzanne Dotson, DHS-Licensing
Larry Bryzinski, DHS-Licensing
Jim Loving, DHS-Licensing
Bob Meyer, DHS-DPDD
Shirley Patterson, DHS-DPDD
Laura Plummer, DHS-Rules

I. Active treatment issue:

The meeting began with a clarification of the ICF/MR "active treatment" requirement by Linda Sutherland. The issue of "active treatment" requirements has been raised a number of times in the past and was recently raised by a task force member. It appears that there is considerable confusion surrounding the requirement and that some parties may be operating under the misconception that six hours of day services is absolutely required in all cases. Therefore, Linda was requested to provide clarification on the issue in terms of HCFA requirements. Linda discussed that there is actually no

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requirement that is hard-and-fast with respect to six hours per day. She indicated that rather what is required is that treatment be consistent throughout the day and that staff persons should be involved. Linda felt that some of confusion may be based on reimbursement-related requirements. Linda will do additional research on this issue and will provide the task force with additional clarification at the next meeting.

A number of members had additional comments on the "active treatment" issue. Laurie Simon commented that retirement for persons with developmental disabilities is an important related issue. Suzanne Dotson related that the real issue of concern is what people are doing during these hours. Anne Henry commented that the main point is that people have a right to day services and that the major issue is that the active treatment program should be separate; i.e., that the same provider does not provide both residential and day services.

II. Residential subcommittee report:

The findings of the residential subcommittee which addressed Rule 34 and 80, was presented by Dave Kiely. Cindy Yess commented that the recommendations prepared by this subcommittee represent the position of ARRM and do not necessarily reflect the position of ARC Minnesota. Task force members were provided materials including a sheet summarizing the recommendations of this subcommittee. The primary recommendation by ARRM proposes the replacement of DHS's implementation and surveying of Rule 34 agencies. ARRM's recommendation would involve facilities which are certified and licensed under federal ICF/MR guidelines no longer being required to meet the Rule 34 survey process, with four specific recommendations (see orange handout regarding ARRM's proposal for Rule 34).

Dave Kiely discussed that, according to ARRM, the differences between Rule 34 and the federal ICF/MR regulations are in the areas of: 1) Rule 185; 2) Rule 10; 3) Rule 40; 4) psychotropic medication

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requirements (feels federal regulations are more restrictive); 5) staffing requirements (Rule 34 sets out hours); and record-keeping requirements.

The overview of ARRM's recommendations was following by substantial discussion. A number of members expressed reservations concerning the recommended elimination of Rule 34 requirements and the Department's survey role, particularly with respect to client safeguards. Dave Kiely responded that it is ARRM's position that the proposal in no way does away with safeguards. Rather, it allows for one-agency monitoring. ARRM feels that this proposal would improve the quality of services.

Anne Henry questioned funding differences and expressed concern regarding client finance protections. Anne pointed out that the prohibitions against staff borrowing money from and selling merchandise to clients, as set forth in part 9525.0285, Subpart 34, is a protection which must be maintained.

Dave Kiely responded that the focus is on one agency doing the surveying and that the objective is not to take away any client protections. He suggested that there are some states where one agency is doing the surveying and have actually expanded on the requirements from the federal regulations.

Jim Loving commented that this proposal is premature given that adequate analysis has not been completed. Jim requested that prior to the next task force meeting, that an analysis be conducted with respect to only those items that differ from the analysis originally done by DHS and that done recently by ARRM.

Shirley Patterson expressed concern about the protections contained in Rules 10 and 40. Specifically, there is concern about the potential loss of the Department's ability to enforce these requirements and protections.

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Lynne Megan responded that Rule 10 is an example of how confused and duplicative reporting and investigation requirements are. Dave Kiely commented that in some cases one investigating agency may find a vulnerable adult violation while another agency may not. Anne Henry requested examples of such cases be provided at the September meeting. Anne followed up by stating that duplication in some areas and cases is not necessarily a bad thing and that it may, in fact, provided additional protection. Dave Kiely commented that there shouldn't be rules on the books that are not being enforced.

Pat Conley questioned what the actual goal of ARRM's recommendation is. Dave Kiely responded that the primary goal is the jurisdiction of one regulatory body and to clarify protection through the appropriate agency.

Shirley Patterson pointed out that licensure is required before certification and there does have to be a state licensure. Pat Conley commented that there will always be frustration if the expectation is the involvement of strictly one agency.

Anne Henry stated that we need to be specific about Rule 40 and Rule 10 requirements and that last year we were more philosophical about where this should lie. She stressed that is important to consider where the expertise is in terms of what agency is involved. Because of this, Anne expressed concerns regarding breaking of DD services.

Shirley commented that most issues deal with aversive and deprivation procedures as well as poor programming.

III. One service principle subcommittee status report:

The remaining three subcommittees were asked to give a brief status report. Full subcommittee reports will be presented at the September meeting.

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Suzanne Dotson provided members with a handout summarizing the work of the one service principle subcommittee to date. Suzanne stressed that the focus of these preliminary recommendations is from a consumer's point of view and is outcome oriented. The format recommended is general service principles with specific service-related sub parts. It was recommended that the one service principle rule could be designed to follow a person through the service system. Such a rule could reference all applicable statutes and rules.

Pat Conley expressed a concern regarding the funding realities and limitations and that these recommendations do not consider the principle of resource scarcity. She suggested the addition of the principle of assuring quality of life within available resources.

Dave Kiely commented that these recommendations represent movement in the right direction toward ease of understanding.

IV. Non-residential subcommittee status report:

Members were provided with minutes from the August 19th meeting of this subcommittee. These minutes contained an analysis of Rules 18, 38, and 42 with respect to those provisions which are duplicative or similar and which could be incorporated into one DD licensing rule. Laurie Simon briefly summarized the findings of this subcommittee. She commented that the focus of the analysis was that there are a number of provisions in each of these three rules which are the same or very similar to one another and that in fact, such provisions in several DD licensing rules could be consolidated into one service principle rules. This would facilitate uniform and consistent implementation and application.

V. Interpretative guidelines subcommittee status report:

Shirley Patterson advised members of LCRAR feedback that they view interpretative guidelines as unauthorized rule making and that we would need some APA legislative exemptions to proceed with the use

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of interpretative guidelines. This subcommittee intends to meet with Mary Ann Hruby and the LCRAR again for further input. A legislative proposal is being considered.

Gerald Glomb commented that he strongly supports the use of more outcome-based standards which would allow providers more flexibility and more time to spend on the provision of quality services.

Linda Sutherland commented that if interpretative guidelines were to be used extensively, the Department would want a copy distribution system for advising those affected of the changes and effective dates.

VI. Next meeting's agenda:

It was agreed that each of the subcommittees would prepare a report and a half hour presentation for the September meeting. This report is to summarize each subcommittee's recommendations to the task force. Members expressed a particular need for clarification of the Rule 34 recommendations and issues.

VI. Concluding discussion:

The meeting concluded with additional discussion regarding Rule 34. Anne Henry reiterated her concerns over the recommendation for the elimination of Rule 34 and commented that the connection between the counties and the providers is very important. She inquired as to what responsibility the ICF/MR would have to assure that services are being delivered according to the ISP, if Rule 34 were eliminated.

Linda Sutherland indicated that she would check the federal section 1864 agreement regarding the jurisdiction of ICF/MRs. The meeting was adjourned at 4:00.

DEVELOPMENTAL DISABILITIES REFORM TASK FORCE MEETING MINUTES

September 30, 1991 1:00-4:00 p.m.
DHS Building Rooms 3-E and 3-F

This was the third meeting of the task force convened pursuant to Minnesota Statutes 1991, section 245A.17. The following members were in attendance:

Sharon Kannenberg, Home and Community Options
Linda Sutherland, Department of Health
Suzanne Dotson, DHS-Licensing Division
Donna Hoverman, Homeward Bound, Inc.
Theresa Mustonen, DHS-DPDD
Dennis McCoy, Blue Earth County
David Kiely, ARRM
Gene Martinez, A.R.C. Minnesota
Cindy Yess, A.R.C. Minnesota
Dale Miller, MnDACA
Jim Abts, Ramsey County
Lynne Megan, REM Inc.
Mary Rodenberg-Roberts, Resident Advocacy Services
Gerald Glomb, Cooperating Community Programs
Anne Henry, Legal Advocacy for Persons with Developmental
Disabilities
Laurie Rose Simon, MSSA/Hennepin County Kevin
Martineau, Minnesota Habilitation Coalition Shirley
Patterson, DHS-DPDD Jim Loving, DHS-Licensing
Division Laura Plummer, Rules and Bulletins Division
Interested persons: Jean Searles, RESA
Terri Williams, Mains'l Services

I. Active Treatment:

The meeting began with a clarification of the federal "active treatment" requirement by Linda Sutherland. Ms. Sutherland stated that when

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she sought clarification from the federal office, she was advised that it is their understanding that active treatment should actually be going on at all times and that there is no specific six hour day training requirement. In terms of which agency should have jurisdiction over ICF/MRs, Ms. Sutherlund stated that the Medicaid agency must contract with Medicare; i.e., the Health Department shall be the certifying agency. Ms. Sutherlund referenced a memo which indicates that surveys may be contracted out. There was some discussion regarding the process followed in the state of New York by which the Health Department retains authority and enforcement power while subcontracting for surveys. Ms. Sutherlund commented that this would require approval from Chicago and that further, the social security regulations require Health Department certification.

II. Four Subcommittee Reports:

It was determined at the August meeting that each of the four subcommittees would prepare and present their final reports to the full task force at the September meeting. The following are the minutes of the discussion related to each respective subcommittee report.

A. Interpretative Guidelines Subcommittee:

Jim Loving stated that this subcommittee was deferring presentation of their final report until after the meeting of the Commissioner of Health and the Commissioner of Human Services regarding the issue of agency jurisdiction of ICF/MRs. The meeting is scheduled for this afternoon. This subcommittee will provide task force members with the results of the meeting between the commissioners at the November task force meeting.

B. Non-residential Rules Subcommittee:

Copies of an overview of recommendations by this subcommittee were distributed to task force members. Laurie Simon summarized the subcommittee's recommendations and requested input by task force members. Dale Miller commented that he would like to see specific

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recommendation that Rule 38 be a part of the plan which is submitted to the Legislature. Mr. Miller commented further that it is important that SOCS are treated consistently with other community-based services.

Laurie Simon inquired about the effects of statutory amendments on rules. Jim Loving discussed the fact that statutory amendments are a separate process which are not subject to the APA rule making requirements and as such, often do not get substantial public input.

Dale Miller suggested that the entire DD licensing process should be looked at and raised specific staff ratio issues. Suzanne Dotson responded to these questions by clarifying Rule 38 requirements in terms of the first two years of implementation of the rule.

Jim Loving discussed the current "key indicators" project which is a licensing project in the child care center area. A result of the use of such "key indicators" would be that providers that provide quality services would be subject to less frequent licensing inspections.

With respect to licensing inspections, Dale Miller commented that protection is inherent in that unannounced inspections are always an option. Kevin Martineau commented that it would be easier to facilitate the process if licensing visits were announced. Mr. Martineau recommended that the use of key indicators should be a general recommendation of this task force. Jim Loving responded that key indicators would have to be used on a rule that is not going to be significantly amended. Lynne Megan commented that the use of key indicators may provide potential to make the system less complicated. Anne Henry commented that the use of key indicators should be a recommendation by the task force as a part of the recommended legislative action. Ms. Henry commented further that we need to discuss the fiscal impact in our recommendations.

C. One Service Principle Rule Subcommittee: Copies of this subcommittee's recommendations were distributed to

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the full task force. Suzanne Dotson summarized the recommendations and requested input by task force members. Ms. Dotson commented that these recommendations as they relate to outcome standards recognize that there still needs to be some procedural requirements; i.e., a combination of outcomes and process. She agreed with the comments by a number of task force members that there the one rule should still contain specific sub parts unique to each service area.

Lynne Megan commented that we need to educate providers to the fact that one rule would simplify the system and would simply mean the creation of yet another rule. Ms. Megan commented that some providers have expressed such concerns.

Cindy Yess suggested that the recommendations of this subcommittee represent an ideal of where we would want to be to start redesigning the system with a consumer orientation. Dave Kiely commented that this subcommittee report is very well done and feels that these principles and consumer empowerment are very important.

Anne Henry commented that the interplay between technical assistance and providing better quality services is an important part of the recommendations of the Legislature. Ms. Henry suggested that we need a good pool of trained staff to provide services. She stressed that the fiscal considerations of training must be considered. Sharon Kannenberg commented that training must be flexible and provide options for training on site.

D. Residential Rules Subcommittee Report:

Copies of a comparison of Rule 34 and federal ICF/MR requirements were distributed to task force members. Dave Kiely prefaced the discussion of the comparison by stating that the analysis conducted by the subcommittee was based on whether a particular requirement is covered in any other regulation. Mr. Kiely reviewed the requirements on a provision-by-provision basis.

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Anne Henry commented that the enforcement mechanism is a major concern and that enforcement differs from Rule 34 to the federal ICF/MR regulations. Dave Kiely responded that the state mandate calls for non duplicative rules and that current enforcement may be duplicative as well as intrusive to the consumer. Mr. Kiely suggested amending Rule 185 to include a provision which obligates the provider.

The major differences between the requirements of Rule 34 and federal ICF/MR regulations were identified in the following areas:

- staff training (competency and process)
- determination of need
- age appropriateness
- functional environment
- copy requirements
- monthly review (not in federal regulations)
- policies
- communication

HI. Agency Jurisdiction Over ICF/MRs:

The discussion then focused on the issue which has been raised in prior task force meetings, of whether a single state agency should have jurisdiction over ICF/MR facilities, and if so, whether the agency should be the Health Department or the Department of Human Services (DHS). It has been suggested that single agency jurisdiction would be a means of eliminating duplication of requirements applicable to ICF/MR facilities.

Anne Henry commented that the Health Department does not have the necessary expertise in the area of developmental disabilities. Ms. Henry commented further that if the Health Department were to assume total responsibility for the supervision of ICF/MRs that this could result in fragmentation of services and more reliance on a medical model. Dave Kieley responded that the Health Department no longer places such a strong emphasis on the medical model.

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A number of task force members pointed out that another proposal is that DHS rather than the Health Department, should oversee ICF/MRs. Theresa Mustonen commented that DHS administers more developmental disabilities regulations than the Health Department.

Dave Kiely expressed concern about DHS surveying its own agencies or service and that this may represent a conflict of interest. He commented further that going back and forth between two agencies creates confusion and results in duplication of effort. Anne Henry countered that enforcement still needs to be addressed notwithstanding the duplication involved. Ms. Henry pointed out that much of the funding for services to persons with developmental disabilities is administered by DHS and that separating ICF/MR services off would result in fragmentation of the system.

Sharon Kannenberg commented that outcome-based rules are necessary for ICF/MR services and that Rule 34 is currently not at all outcome-based.

Suzanne Dotson discussed that the way licensing surveys are currently conducted is a function of the way the rule is written and that there are a number of paper compliance requirements for licensors to check. Ms. Dotson added a general recommendation that Rule 80 is obsolete and could be eliminated.

The next meeting of the task force was rescheduled for Monday, November 4th from 1:00-4:00 due to a conflict on the originally scheduled November 7th date. The meeting was adjourned at 4:00 p.m.

**DEVELOPMENTAL DISABILITIES REFORM
TASK FORCE MEETING MINUTES
DECEMBER 2, 1991**

The following members were in attendance:

Gene Martinez, Arc Minnesota
Cindy Yess, Arc Minnesota
Lynne Megan, ARRM
Dave Kiely, ARRM
Linda Sutherland, Health Dept.
Gerald Glomb, Cooperating Community Programs
Anne Henry, Legal Advocacy
Laurie Simon, MSSA
Donna Hoverman, Homeward Bound
Larry Burzinski, Licensing Div.
Suzanne Dotson, Licensing Div.
Bob Meyer, DPDD
Shirley Patterson, DPDD
Laura Plummer, Rules

The focus of this meeting was to discuss the response of task force members to the Department's draft proposals for recommendations to be submitted to the Legislature.

RECOMMENDATION #1: AMENDMENTS TO RULE 34.

Dave Kiely voiced concern over what will happen to those items which were considered no significant difference. He criticized the proposal on the basis that in his opinion, the legislative intent was to take specific action on the actual rule provisions to be eliminated. Dave inquired what will happen if the standards that ARRM is proposing aren't agreed upon by the rule committee. He suggested that we need another track to address issues that aren't resolved to assure that there will be some mechanism for a hearing. Dave stated further that ARRM is primarily interested in getting to a one rule/one agency system and that those areas that were considered by the subcommittee to be no significant difference are ARRM's primary

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concern.

Linda Sutherland commented that the subcommittee spent a lot of time and that therefore, some use should be made of their product. She indicated that the subcommittee found that many requirements were "no significant difference" and feels that these requirements should be addressed as being duplicative.

The Department assured members that the work done by this subcommittee will be utilized as a basis for the rule advisory committee's work, but that the rule will still have to go through the APA process.

Lynne Megan inquired as to what will be the procedure to let providers know the status of Rule 34 and suggested that all Rule 34 providers be kept apprised of the status. Lynne also requested that the task force members be sent a projected schedule of promulgation for Rule 34 amendments based on completion of committee work in May 1992.

RECOMMENDATION #2: INTERPRETATIVE GUIDELINES.

Linda Sutherland discussed the status of the Health Department's nursing home rules and pursuit of the use of interpretative guidelines. Linda indicated that she feels there is some realization by the Legislature that the rule making process is time-consuming and burdensome. She stated further that she would like to get back to a time when more direction was given in statute.

Anne Henry responded that caution must be exercised in pursuing the use of interpretative guidelines and changes to the APA. She suggested that this effort should initially take the form of a pilot project. Bob Meyer agreed that the use of interpretative guidelines should be viewed with some caution due to the fact that interpretative guidelines could be used a number of different ways. Anne Henry

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commented that the goal should be to allow additional options that keep up with the state-of-the-art while not reinterpreting the current standards.

Linda Sutherland commented that without the options, we end up writing rules that allow for only one way of doing things. Dave Kiely suggested that we word this recommendation more strongly in order to urge the Commissioner to consider a pilot or demonstration project in the use of interpretative guidelines.

RECOMMENDATION 3#: CONSOLIDATION OF REVIEW AND REINFORCEMENT.

Linda Sutherland commented that the regional office was a little concerned that there be some health professionals involved in the review process and she discussed the high costs involved in federal training requirements for surveyors.

Dave Kiely commented that this proposal is disappointing to ARRM because this recommendation does not allow for continued provider input and oversight. He stated further that the focus should be on consumers and not on the possibility of laying off staff.

Linda Sutherland acknowledged that DHS had forwarded a list of options to the Health Department regarding joint surveys, but that they have not yet been considered by the Health Department. She also commented that the implications of the Vulnerable Adult Act are also an important consideration.

Anne Henry suggested that a task force be convened or this task force reconvened to gather input and consider specifically the issue of joint surveys. Jean Searles gave the example of psychotropic medication monitoring as an area where joint surveys would be beneficial.

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RECOMMENDATION #4: SINGLE RULE FOR DP PROGRAM STANDARDS.

Gene Martinez inquired how the work on Rule 34 would fit into the one DD program rule. Lynne Megan commented that she feels we are missing a step; is there a process we can use to inform the public and to determine if they're interested in such a concept. She feels that we really need to sell the merits of one DD licensing rule. The Department agreed and suggested that conducting regional information meetings would be an effective means of obtaining cross-representational input. Anne Henry suggested that the provider groups present this idea at conferences, etc. The Department indicated that such public session could be set up by next fall. Jean Searles suggested using a graduate student/intern to conduct an analysis of the input. Suzanne Dotson stressed that if a student were used for this purpose, that it would be essential for the student to work closely with the Department or this task force in order to get the complete context.

RECOMMENDATION #5: TECHNICAL ASSISTANCE.

Laurie Simon inquired why a department person couldn't provide the technical assistance. Anne Henry responded that it would be better to have an objective third-party consultant to provide the assistance.

Dave Kiely suggested that this proposal use stronger language in which the task force recommends that the Legislature fund, at least in part, a technical assistance pilot project. He suggested that such a pilot project could be based on a designated region or target population.

RECOMMENDATION #6: ALTERNATIVE REGULATORY METHODS.

Anne Henry cautioned that this issue should be looked at very carefully because accreditation in lieu of licensure would be based on

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provider organization standards. She stated further that the state may not want to be bound by provider-developed standards.

Linda Sutherland commented that there is some confusion over what is meant by deemed status and that she feels it means that the provider still needs to meet all other applicable standards. She indicated it has to be decided whether deemed status means that the other rules are not applicable or that there could be a spot check on other compliance. Linda stated that the Health Department has generally been dissatisfied with the results of deemed status in the hospital setting and that is difficult for provider organizations to keep in mind the "shadow" regulations.

Anne Henry expressed concern that these types of accreditation do not constitute a system which is accountable to the public. Dave Kiely indicated that ARRM does not have a stance either way, but doesn't feel this should be a recommendation of the task force since it has not been fully considered during the task force process. Laurie Simon agreed that providers should be publicly-accountable since public funds are being expended for the cost of services.

RECOMMENDATION #7: NEED DETERMINATION.

The Department advised task force members that there is a legislative proposal regarding extending the time frame for completing the Re-determination of Need review by the county of existing service providers from two years to every four years. Dave Keily responded that this is a positive recommendation.

LICENSING DIVISION PRELIMINARY FINDINGS OF DUPLICATION.

Larry Burzinski then presented a summary of some preliminary analysis done by the Licensing Division of duplication in Rules 18, 38, and 42. This material was presented to task force members in draft, preliminary form and did not represent any final recommendations or

DEVELOPMENTAL DISABILITIES REFORM TASK FORCE MEETING MINUTES 12/2/91

commitment on the part of the Department. Dave Kiely commented that he applauded such efforts on the part of the Licensing Division. Laurie Simon questioned the deletion of personnel policies. Anne Henry commented that providers' financial information is still needed for rate setting rules. She urged that these preliminary recommendations should not be used as a final recommendation to the task force but rather, should be forwarded to the committee that will be convened to work on the one DD licensing rule.

FORMAT OF REPORT TO THE LEGISLATURE.

The task force next discussed the format of the plan which is to be submitted to the Legislature in January. Anne Henry suggested that we keep it brief with a minimum of attachments and that we use an Executive Summary format to assure that legislators read the report.

CONSENSUS ON FINAL RECOMMENDATIONS.

Dave Keily revisited the issue of how to proceed with controversial amendments to Rule 34 as proposed in recommendation #1. Anne Henry commented that she feels it would be a waste of time and money to proceed with non-controversial amendments on a different track than that of the one service principle rule.

The task force reached a general consensus that recommendations numbers 1 through 5 and recommendation number 7 should be included in the report to the Legislature. The Department will send task force members a draft of the plan for review and comment by Christmas. Task force members were requested to return written comments on the draft as soon as possible.

Report of the Task Force on

Reform of Rules and Regulations
Affecting Services to Persons with
Developmental Disabilities

Appendix IV

Subcommittee

Membership

DD REFORM TASK FORCE SUBCOMMITTEES

SERVICE PRINCIPLES

Convener: Suzanne Dotson
Lynne Megan Karen
Pate Theresa
Mustonen

RESIDENTIAL RULES: DUPLICATION AND INCONSISTENCIES

Convener: Dave Kiely
Gene Martinez
Jim Abst
Cindy Yess
Mary Rodenberg-Roberts
Karen Pate
Linda Sutherland
Bob Meyer

NON-RESIDENTIAL RULES: DUPLICATION AND INCONSISTENCIES

Convener: Laurie Simon
Kevin Martineau
Dale Miller
Sharon Kannenberg
Dennis McCoy
Lynne Megan
Gerald Glomb
Laura Plummer

INTERPRETATIVE GUIDELINES

Convener: Shirley Patterson
Jim Loving
Linda Sutherland
Pat Connolly

Report of the Task Force on

Reform of Rules and Regulations
Affecting Services to Persons with
Developmental Disabilities

Appendix V Subcommittee

Recommendations

MEMORANDUM

DATE: September 30, 1991

TO: Developmental Disabilities Reform Task Force Members

FROM: Non-residential Rules Subcommittee

SUBJECT: RECOMMENDATIONS TO THE TASK FORCE

I. GENERAL RECOMMENDATIONS

*The development of one service principle rule for DD licensing: This subcommittee has analyzed rules 18, 38, and 42 and recommends that the administrative and service requirements generally applicable to all of the services be incorporated into one rule. It is recommended that such a rule would also include sub parts containing specific requirements unique to each different service area.

*Streamlining of the rule making process: A number of members feel the process involved in promulgating rules is overly time-consuming and cumbersome. It is recognized that such a recommendation may require legislative action.

*Staff training: This requirement, in particular, should be consolidated and made consistent across DD service areas. Such uniformity and elimination of duplication would facilitate a more efficient and cost-effective delivery system.

*Background applicant study requirements: Due to the promulgation of Rule 11, these requirements should be deleted from all DD rules to avoid inconsistency and confusion. Other rules could simply cross-reference Rule 11.

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II.. SPECIFIC RECOMMENDATIONS RE: RULE PARTS WHICH COULD
BE INCORPORATED INTO ONE DP LICENSING RULE.

A. Rule 18

<u>Part Number</u>	<u>Requirement Definitions</u>
9525.0500	Administrative Standards
9525.0570	Discharge Standards (include admission standards and grievance procedures)
9525.0580	
	Client Records
9525.0590	Client Rights
9525.0600	Organizational Description
9525.0610	Personnel Policies
9525.0620	Emergency Procedures
9525.0630	Financial Records Rates
9525.0640	
9525.0650	

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B. Rule 38

<u>Part Number</u>	<u>Requirement</u>
9525.1500	Definitions
9525.1550	Administrative Policies and Records
9525.1560	Admission and Discharge Staff
9525.1610	Qualifications Staff Training Health
9525.1620	and Safety
9525.1660	

*Also include consumer satisfaction provisions in general rule

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NON-RESIDENTIAL SUBCOMMITTEE RECOMMENDATIONS
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C. Rule 42

<u>Part Number</u>	<u>Requirement</u>
9525.2010	Definitions
9525.2020	General Licensing Requirements
9525.2025	Negative Licensing Requirements
9525.2030	Service Requirements Service
9525.2050	Initiation
9525.2060	Rights of Persons Receiving Services
9525.2070	Resources (client finances)
9525.2090	Assessment Evaluation Terminating
9525.2110	Services Staff Training and
9525.2120	Orientation
9525.2140	

STATE OF MINNESOTA
DEPARTMENT OF HUMAN SERVICES
DIVISION OF LICENSING

, September 30, 1991

MEMO

TO: Laura Plummer
Task Force on Regulatory Reform

FROM: Suzanne Dotson
Lynn Megan
Theresa Mustonen
Cindy Yess

SUBJECT: Recommendations on Developing a Service Principles Rule

The sub-committee was charged to review the efficacy of developing a single rule for DHS-licensed services provided to people with developmental disabilities. Recommendations to be included in the report to the legislature in January, 1992 are presented below. These recommendations are based on our earlier report (submitted August 26, 1991) and the attached resource documents.

RECOMMENDATIONS TO LEGISLATURE

REQUIRE THE DEVELOPMENT AND PROMULGATION OF ONE RULE GOVERNING DHS LICENSED SERVICES TO PEOPLE WITH DEVELOPMENTAL DISABILITIES. THE RULE SHOULD BE BASED ON STATE-OF-THE-ART SERVICE PRINCIPLES WHICH EMPHASIZE HUMAN DIGNITY AND FOCUS ON OUTCOMES FOR THE CONSUMER, RATHER THAN PROCEDURES FOLLOWED BY LICENSE HOLDER.

RATIONALE:

Services provided to people with developmental disabilities should emphasize their inclusion into activities with families, neighbors, co-workers, and friends. Individuals receiving services should be provided with instructional opportunities necessary for acquiring the skills needed for participation in functional activities in the communities in which they reside, work, and recreate. In addition, recipients of services should be encouraged to engage in self-advocacy, and be provided with instruction in making decisions and choices.

Regulations are a valuable means of assuring that services to people with developmental disabilities meet certain quality standards. Frequently however, reviews of services focus on the agency's documentation of its activities and its compliance with regulations. Little time is devoted to observing the recipients of services. Development of a rule focused on consumer outcomes would shift the emphasis of the review from processes followed by the provider to quality of life experienced by the consumer.

2. REQUIRE THAT THE RULE DEVELOPED AND PROMULGATED BE A SINGLE RULE TO GOVERN ALL DHS LICENSED SERVICES TO PEOPLE WITH DEVELOPMENTAL DISABILITIES.

RATIONALE:

Currently, DHS enforces separate rules for different types of service provided to people with developmental disabilities. While some rules pertain to all environments (e.g., Rule 40; Rule 10), most pertain only to certain environments (e.g., Rule 38 applies to day training and habilitation services; Rule 42 governs wavered service programs).

Nationwide, there is growing support for evaluating how services are delivered and the outcomes of those services rather than on where services are delivered. Some states have already enacted new types of licensing procedures which span environments. (See the resource document, appendix A.) The subcommittee recommends legislative changes to allow licensing all services to people with developmental disabilities under one rule. This would allow a shift in the emphasis of licensing reviews to one of ensuring quality of services and consistency of practices, based upon accepted principles, regardless of the setting.

3. AUTHORIZE AND PROVIDE ADEQUATE FUNDING FOR A SYSTEM THAT WILL DELIVER TECHNICAL ASSISTANCE TO PROVIDERS, AS NEEDED.

RATIONALE:

Currently, licensed providers experiencing difficulties in providing quality services are primarily responsible for obtaining technical assistance. The importance of technical assistance in improving the quality of services is illustrated in the statements which follow:

"The conduct of quality assurance around the country has been hampered by a variety of problems. In part, these problems reflect a failure to understand the overall aim of quality assurance, which is to enhance services as well as to regulate them. Specifically, quality assurance systems are almost always aimed at past abuses and not on future capacity. They are punitive and rarely generate the needed training or resources necessary to rectify the problems uncovered."

Valerie J. Bradley, Conceptual
Issues in Quality Assurance.

"A third element in the quality assurance system is the essential Modus Operandi: being proactive rather than reactive, rewarding and assisting performance rather than policing or sanctionizing."

Smith and Gettings,
Defining a Constructive
State and Federal
Partnership.

" . . . high quality community services cannot be maintained over time when the only response to a problem is to take punitive measures. The stability of community service depends upon assisting service providers to improve their performance. However, the institutional regulatory model focuses solely on sanctioning provider agencies for infractions rather than addressing the root causes of such shortcomings."

James W. Conroy and Cecelia S.
Feinstein, A New Way of Thinking
About Quality.

"The traditional methods of improving services were originally designed to satisfy the taxpayer and policymaker. State of the art methods (of regulation) are dedicated to ensuring that first and foremost, the consumer's needs, wants and desires are recognized; second, that systems exist to address these basic human concerns in a responsive manner."

Madeline H. Kimmich, The
South Carolina Model.

It is recognized that regulatory agencies must retain their ability to respond swiftly to situations in which the health, safety, and well-being of consumers is endangered. Technical assistance, or "capacity building" may be ineffective under some circumstances. However, negative sanctions may be more effective if their use is reserved for providers who have shown that technical assistance has failed to improve quality, or in situations in which the lives of consumers are threatened by actions of providers.

The subcommittee recommends the development of an organized system for providing technical assistance to facilitate the provision of quality services. Funding must be an integral part of any system that is developed.

4. AUTHORIZE A TEMPORARY VARIANCE TO THE ADMINISTRATIVE PROCEDURES ACT TO ALLOW THE USE OF INTERPRETIVE GUIDELINES AND/OR EXAMPLES CONTAINED IN THE RULES GOVERNING DHS-LICENSED SERVICES TO PEOPLE WITH DEVELOPMENTAL DISABILITIES.

RATIONALE:

Currently DHS has not been able to use either interpretive guidelines or examples of compliance in the writing of rules. Interpretive guidelines and/or examples would assist providers in understanding the intent of the rule parts and in complying with the rule parts. It would also assist licensors to more consistently interpret and enforce rule parts.

A temporary variance, for DHS-licensed services to people with disabilities only, would provide an opportunity to pilot the use of interpretive guidelines and/or examples, to determine if their use is feasible.

5. REQUIRE THAT THE RULE:

- * WEIGHT THE IMPORTANCE OF COMPLIANCE ITEMS.
- * USE LANGUAGE THAT REFLECTS THE EXPERIENCES OF THE CONSUMERS (E.G. "I HAVE REGULAR EXPOSURE TO NEW EXPERIENCES AND IDEAS").

RATIONALE - WEIGHTING:

Current procedures treat all rule items as equally important. This often results in providers paying the same attention to rule items which have little impact on a consumer's quality of life as they do to items which impact greatly quality of life. A disproportionate amount of time may be spent on complying with rule parts rather than attempting to improve quality of programs.

Weighting the importance of rule parts would allow a license holder to prioritize tasks and focus on consumer-centered items first. It would also allow licensors increased opportunities to provide positive feedback for compliance which goes beyond minimum standards.

RATIONALE - CONSUMER LANGUAGE

Refer to rationale in recommendation number 1 above, regarding consumer outcomes.

Since the people receiving services in DHS-licensed programs are the consumers of the licensed programs, quality of service should be judged primarily from the viewpoint of service recipients. This is done by measuring their quality of life and comparing it to that of other community members.

DEPARTMENT COMPARISON

DHS Rule part	DHS Requirement	CFR Ref. Part	CFR Requirements	Comparison	Comments
<u>Licensure</u> 9525.02435	This section requires specific conditions to obtain a DHS license including: 1. Must not operate a program unless licensed by DHS and by MDH. 2. Must have an approved need determination. 3. Must complete applicant background studies. 4. Must provide administrative records. 5. Must comply with disqualification standards. 6. Must have separate license for each location. 7. Must provide evidence of compliance with other regulatory agencies. 8. Must apply for change in license terms. 9. Must give the commissioner access. 10. May request variances to rule parts.	CFR 483.410 (b) CFR 483.420 (d)(1)(iii)	requires that programs be in compliance with all federal, state, and local laws, regulations and codes pertaining to health, safety, and sanitation Also prohibits employment of persons with convictions or prior employment history of child or client abuse, neglect, or mistreatment	Similar	Duplicated, in part, in CFR.
<u>Negative Licensing Action</u> 9525.0243	Commissioner may take negative action against a license if a program fails to comply with the rules and regs.	none	n/a	Omitted	none
<u>Program Requirements</u> 9525.0245 Subp 1.	Must ensure services in accordance with individual needs as specified in ISP/IHP	CFR 483.440 (c)(1)(ii)	requires that programs be designed to meet the client's needs	similar	MDH not limited by ISP/IHP, i deals only with programs, not all services provided.
9525.0245 Subp 2.a.	Methods, materials, and settings in implementing ITPs must increase independence by teaching skills that reduce dependence on care-givers.	CFR 483.440(c)(1)(i)	requires active treatment necessary for the acquisition of behaviors to function as independently as possible	Duplicated	requires ITP must include opportunities for choice and self management. CFR 483.440 (c)(6)(i) (c). requires that ITPs must describe relevant interventions to support the individual towards independence
9525.0245 Subp 2.b.	Provide training in functional environment including	CFR 483.420	facility must ensure clients the	similar	Rule 34 requires that the facility

<u>DHS Rule part</u>	<u>DHS Requirement</u>	<u>CFR Ref. Part</u>	<u>CFR Requirements</u>	<u>Comparison</u>	<u>Comments</u>
	environments used by non-disabled individuals.	(a)(11)	opportunity to participate in social, religious, and community group activities		provide the clients with training to achieve these outcomes, while the CFR regs do not. The CFR guidelines state that these activities must occur in a normalized, community-integrated way.
9525.0245 Subp 2.c.	increase each persons opportunities to interact with non-disabled persons who are not paid care-givers and in settings used by non-disabled individuals.	CFR 483.420 (a)(11)	ensure clients the opportunity to participate in social, religious, and community group activities	duplicate	see subp 2b in III., above
9525.0245 Subp 2.d.	Increase each persons opportunities to participate in a variety of generic community resources.	CFR, see subp 2b in III., above	see subp 2b in III. above	duplicate	see subp 2b in III. above
9525.0245 Subp 2.e.	Increase each person opportunities to increase decision making skills and to make informed choices in all aspects of daily living.	CFR, see subp 2b in III., above	see subp 2b in III., above	Duplicated	None
		CFR 483.420 (a)(3,4)	allow and encourage individual clients to exercise their rights and to manage their financial affairs and be taught to do so to the greatest extent possible	Duplicated by CFR, see subp 2b in III., above, and CFR 483.420 (a)(3,4)	none
9525.0245 Subp 2.f.	Use materials, activities and interactions similar to those used by individuals of the same chronological age who are not disabled.	none	n/a	omitted	Omitted from CFR regulations, however, CFR Interpretative Guidelines for CFR 483.440 (d)(2) instructs surveys to monitor for age-appropriate materials and

DHS Rule part	DHS Requirement	CFR Reg. Part	CFR Requirements	Comparison	Comments activities
9525.0245 Subp 3.	A person may be restricted only as necessary for protection and as specified in the ISP/THP. Supervision and assistance provided only when necessary to complete a task, participate, or for protection.	none	n/a	omitted	none
9525.0245 Subp 4.	Document measures as required by ISP to increase level of participation by person. Measures include staff assistance or supervision, training, and adaptations.	none	n/a	omitted	CFR does not require documentation, however MDH does survey for these outcomes, see CFR in Subp 2b in III., above. Further, MDH surveys are not limited by the ISP, so this is assured for all people at all times.
9525.0245 Subp 5.	Staff must treat persons with respect, protect their privacy, and do not use language emphasizing their disability.	CFR 483.420(a)(7)	requires that personal privacy is ensured during treatment and care of personal needs	Duplicated	None
9525.0245 Subp 6.	Requires protection of persons' rights.	and CFR 483.420(d)(1)	requires that clients are not psychologically or verbally abused	Duplicated	CFR does not specifically address "respectful treatment."
9525.0245 Subp 7.	License holder must document that resources outside the residential program are used in offering ancillary services.	CFR 483.420.	Requires protection of persons' rights.	Duplicated in CFR 483.420.	none
		none	n/a	omitted	No documentation required in CFR. However, MDH does

<u>DHS Rule part</u>	<u>DHS Requirement</u>	<u>CFR Ref. Part</u>	<u>CFR Requirements</u>	<u>Comparison</u>	<u>Comments</u>
9525.0245 Subp. 8.	If specified in each ISP/IHP, persons must leave residence to participate in education, employment, or community activities. License holder shall ensure that the residential program is prepared to care for persons who are at home ill, or because of work schedule or other reasons.	CFR 483.430 (c)(2)	states that there must be direct care staff on duty and awake on a 24 hour basis when clients are present in each living unit.	Duplicated in CFR 483.430 (c)(2)	MDH is not limited by the ISP/IHP, adequate staffing is ensured for all people at all times.
9525.0245 Subp. 9.	Routine must be similar to that in the community for individuals of similar chronological age.	CFR 483.440 (d)(2)	The facility must develop an active treatment schedule.	Duplicated	CFR Interpretive guidelines state: clients should rise, eat meals, and retire at times that coincide with peers who are not disabled so that they can learn the normal "rhythm of the day."
<u>Physical Environment</u> 9525.0255 subp 1A.	Says that vocational services and residential services cannot take place in the same location.	none	n/a	omitted	none
9525.0255 sub 1.b.	Floor to ceiling walls.	CFR 483.470 (b) (v)	Walls must extend from floor to ceiling	Duplicated	none
9525.0255 subp 1.c.	No more than 16 people per living unit.	none	n/a	omitted	none
9525.0255 sub 1.d.	No more than 4 persons per bedroom if licensed before 10/10/89, 2 persons after 10/10/89.	CFR 483.470 (b) (iii)	duplicates the four person requirements but omits the	similar	None

<u>DHS Rule part</u>	<u>DHS Requirement</u>	<u>CFR Reg. Part</u>	<u>CFR Requirements</u>	<u>Comparison</u>	<u>Comments</u>
9525.0225 sub 1.e.	Maintain furnishing and equipment in good repair and similar in appearance to other neighborhood homes.	CFR 483.470 (b)(4)(iv)	requires functional (bedroom) furniture appropriate to the clients' needs.	Similar	CFR addresses only the clients' bedrooms, and does not address normalized living environment.
9525.0225 sub 1.f.	provide suitable storage space for personal possessions same as nondisabled person's	CFR 483.470 (c)(2)	Suitable storage space for personal possessions.	similar	Does not require similarity with nondisabled individuals.
9525.0225 sub 1.g.	Must have a kitchen and dining room per living unit after 10/10/89. (each 16 people)	none	n/a	Omitted	none
9525.0225 sub 2.	Residence and furnishings adapted to meet sensory, mobility, physical, or behavioral needs, if required in ISP\IHP.	CFR 483.470 (b)(4)(i)	Functional furniture (bedroom) appropriate to the clients' needs.	similar	DHS cannot enforce this rule part, even if needed, unless included in ISP\IHP. CFR requires all the time for all people.
9525.0225 sub 3.	Telephone must be available for personal use	CFR 483.420 (a)(10)	The same except as contraindicated by factors identified in program plan.	similar	none
9525.0225 sub 4.	May lock exterior doors only for safety; cannot restrict movement or use as a substitute for staff.	none	n/a	omitted	none
<u>Provider</u> <u>Implementation Plan</u> 9525.0265 Subpart 1.	Must have PIP for each person, IHP or portions thereof may be substituted for PIP.	CFR 483.440 (C)(1)	requires each client must have an individual program plan	similar	No references to IHPs in CFR.

DHS Rule part	DHS Requirement	CFR Ref. Part	CFR Requirement	Commentary	Comments
9525.0265 subp 1.a.	requires that PIP be developed by a team that includes living unit supervisor, direct service staff, any other individuals designated by the person, the LAR, case manager, or living unit supervisor.	CFR 483.440 (C)(1,2)	IDT must develop an IPP. IDT includes representatives of the professions, disciplines, or services relevant to identify client's needs and design programs.	Same as above	CFR 483.440 (C)(1,2) duplicates this rule part except does not require case manager.
9525.0265 1.b.	PIP must be based on residential service needs ED-6 in the ISP, and conform to the objectives in the HIP.	none	n/a	omitted	NONE
9525.0265 1.c.	Plan must be developed within 30 days after admission, and revised annually thereafter.	CFR 483.440 (C)(4) and CFR 483.440 (F)(2)	IDT must prepare IPP 30 days after admission, with specific objectives to meet client's needs. Annually, functional assessment must be reviewed by IDT and updated, as needed.	Similar	CFR 483.440 (C)(4) duplicates 30 day requirement, CFR 483.440 (F)(2) duplicates the annual review requirement.
9525.0265 1.d.	Plan must be in writing and signed by the LAR.	none	none	omitted	CFR 483.440 (C)(5) and (7) requires copies to be provided, if the training programs are in writing. No requirement for signatures.
925.0265 1.e.	Must provide copy of plan to case manager, LAR within 5 days of development.	none	none	none	Duplicated as above - CFR 483.440 (C)(7), except no five-day availability timeline, and not provided to the case manager.

<u>DHS Rule part</u>	<u>DHS Requirement</u>	<u>CFR Reg. Part</u>	<u>CFR Requirements</u>	<u>Comparison</u>	<u>Comments</u>
9525.0265 Subpart 2	Evaluations of needs must be conducted in the program and the community.	CFR 483.440 (C)(3)	IDT must assess client within 30 days, assessment must be comprehensive and functional.	duplicate	none
9525.0265 2.a.	Individual Abuse Prevention Plans (IAPP) and any additional assessments requested by the case manager.	CFR 483.420 (A)(5)	Clients must not be subjected to physical, verbal, sexual, or psychological abuse or punishment.	similar	CFR 483.420 (A)(5) requires that clients not be subjected to abuse/neglect, but does not have a requirement for other assessments requested by the case manager.
9525.0265 2.b.	Must provide written summaries of all evaluations and service recommendations to case manager, person, and LAR.	none	n/a	omitted	none
9525.0265 2.c.	Must advise case manager when additional evaluations are needed, and conduct evaluations, when requested, by the case manager.	none	n/a	omitted	none
9525.0265 Subpart 3.a.	PIP must include written, measurable objectives with measurable criteria for mastery.	CFR 483.440 (C)(4)(iii)	Objectives must be in behavioral terms, measurable, and show progression of development.	duplicate	none
9525.0265 3.b.	PIP must include a baseline skill level for each objective.	none	n/a	omitted	none
9525.0265 3.C.	PIP must include specific methods including info about techniques, physical and social environments, equipment, and materials needed to implement the objective.	CFR 483.440 (C)(5)(i) and (ii)	require methods and schedule of implementation.	similar	none

<u>DHS Rule part</u>	<u>DHS Requirement</u>	<u>CFR Ref. Part</u>	<u>CFR Requirements</u>	<u>Comparison</u>	<u>Comments</u>
9525.0265 3.d.	PIP must include listing of projected starting and completion date for achievement of each objective.	CFR 483.440 (C)(4)(ii)	requires projected completion date, but not starting date.	similar	none
9525.0265 3.e.	PIP must include description of types of data and methods and schedule of data collection to measure outcomes.	CFR 483.440 (5)(v)	requires type of data and frequency of collection.	similar	none
9525.0265 3.f.	PIP must include names of staff or contractors who will implement.	CFR 483.440 (C)(5)(iii)	Each program to implement objectives must specify the person responsible for the program.	duplicate	none
9525.0265 3.g.	PIP must include how plan will be coordinated with other service-providing agencies.	none	n/a	omitted	none
9525.0265 3.h.	PIP must include description of how implementation involves family and friends.	none	n/a	omitted	none
9525.0265 Subpart 4.	PIP must be implemented in accordance with 9525.0245 (refer to that part of this analysis).	none	none	omitted	none
9525.0265 Subpart 5.	Living unit supervisor must review PIP progress monthly.	CFR 483.440 (F)(1)	requires review as necessary by the OMRP (necessary is determined by the facility).	similar	CFR 483.440 (F)(1) similar, but not the same, requires review as necessary by the OMRP (necessary is determined by the facility).

<u>DHS Rule part</u>	<u>DHS Requirement</u>	<u>CFR Reg. Part</u>	<u>CFR Requirements</u>	<u>Comparison</u>	<u>Comments</u>
9525.0265 S.A.	Must modify methods, if indicated.	CFR 483.440(F)(1)(i) - (v)	IHP must be reviewed by OMRP and revised as necessary.	duplicate	none
9525.0265 S.B.	must summarize in writing any modifications and directions to staff for implementation of modifications.	none	n/a	omitted	none
9525.0265 S.C.	must sign and date monthly review.	none	n/a	omitted	none
9525.0265 S.D.	must notify case manager if modified.	none	n/a	omitted	none
9525.0265 Subpart 6.	Must provide person or LAR and case manager with a quarterly report containing a summary of data, analysis of data, and evaluation of services provided, sufficient to determine progress as indicated in ISP/IHP and if provision is in accordance with ISP/IHP and must state whether any changes are needed in ISP/IHP.	none	n/a	omitted	none
9525.0265 Subpart 7.	Must provide case manager with written evaluation of outcomes, copies of evaluations completed, recommendations for changes in ISP and IHP, 30 days prior to the annual review.	CFR 483.440 (F)(2)	requires that the IDT review the assessments annually and updated as needed, and revise the IHP accordingly.	similar	No requirement to provide this information to the county 30 days prior to the review.
9525.0265 Subpart 8.a.	License holder must ensure coordination with the case manager, in accordance with the following requirement: staff who have worked with the person must participate in the IDT meeting, that develops the IHP.	CFR 483.440 (C)(1) and (2)	Each client must have IHP developed by IDT represented by appropriate professionals, appropriate facility staff must participate in IDT. Other	duplicate	CFR 483.440 (C)(1) and (2) duplicates, except, no IHP required.

<u>DHS Rule part</u>	<u>DHS Requirement</u>	<u>CFR Ref. Part</u>	<u>CFR Requirements</u>	<u>Comparison</u>	<u>Comments</u>
9525.0265 8.B.	License holder must ensure coordination with the case manager, in accordance with the following requirement: within 30 days after IDT meeting license holder must revise the PIP and implement changes according to IHP.	CFR 483.440 (F)(2)	requires that IHP annually be reviewed and revised as appropriate.	similar	CFR 483.440(F)(2) does not require timeline, nor is it tied to the IHP.
9525.0265 8.C.	License holder must ensure coordination with the case manager, in accordance with the following requirement: License holder must notify the case manager of significant changes in a persons condition, additional resources needed to implement the PIP, changes in the program that affect the license holders ability to implement the PIP.	none	n/a	omitted	CFR 483.420 (C)(6) requires that the license holder notify the parents or guardian of any significant incidents or change in the client's condition. Does not require that a case manager be notified, or that any of the other specific information be provided.
<u>Family Involvement</u> 9525.0275 Subp 1.	Must invite a family to participate in providing services.	CFR 483.420 (C)(1)	Promote participation of parents and legal guardians in process of providing active treatment, unless unobtainable or inappropriate.	Duplicated	none
9525.0275 Subp 2.	Must invite members of the family to participate in the development of the individual program	CFR 483.440 (C)(2)	Participation by client, parent, or LAR required, unless unobtainable or inappropriate.	duplicated	Rule 34 requires a copy of the invitation must be kept on file - This is not duplicated in CFR.
9525.0275 Subp 3.	Family members must be allowed to visit at any time,	CFR 483.420	Promote visits at reasonable	Duplicated	CFR can limit family involvement

<u>DHS Rule part</u>	<u>DHS Requirement</u>	<u>CFR Reg. Part</u>	<u>CFR Requirements</u>	<u>Comparison</u>	<u>Comments</u>
	unless an adult receiving services objects, or the ISP contains restrictions.	(C)(3,4)	hours without notice, unless IDT determines not appropriate.		through the IDT while Rule 34 can limit family involvement through the ISP.
<u>Resources</u> 9525.0285 Subp 1.	Each person must have access to their own personal funds, unless restricted by the ISP.	CFR 483.420 (a)(4)	Requires allowing individual clients to manage their own affairs and to teach them to do so to the extent of their capabilities.	similar	RM allows ISP to limit/restrict use of personal funds while CFR does not. CFR requires that programs train people in the use of their own funds, RM does not.
9525.0285 Subp 2.	No commingling of funds.	CFR 483.420 (b)(1)(ii).	Precludes any co-mingling of client funds with facility funds or any other person's funds.	Duplicated	none
9525.0285 Subp 3.	If required in the ISP/IHP program must assist in the safe-keeping of the money, provide financial statements, limit the amount of cash and valuables retained, and return within 3 days of request.	CFR 483.420 (b)(1) and (b)(2)	Assures complete accounting of funds. Record must be made available on request	Similar	RM only allows program to keep money if the ISP/IHP requires them to do so. CFR requires the program return the money/goods upon request, RM requires the return within 3 days.
9525.0285 Subp 4.	Prohibits financial exploitation and prohibits a program from requiring a person to purchase items reimbursable under Medical Assistance.	none	none	omitted	none
<u>Admission and Discharge</u> 9525.0295 Subpart 1.	Requires case management approval of placement.	none	none	omitted	none

DHS Rule part	DHS Requirement	CFR Ref. Part	CFR Requirements	Comparison	Comments
9525.0295 Subp 2.	Must be written policies and procedures governing discharge.	none	none	omitted	none
9525.0295 Subp 3.	Must be written policies and procedures governing discharge. Allows self-initiated discharge.	none	none	omitted	none
9525.0295 Subp 4.	Discharge initiated by the license holder is restricted and controlled.	CFR 483.440 (b)(4)	records must show discharge for good cause and provide reasonable time for transfer.	Similar	CFR does not restrict and control discharges initiated by the license holder to the extent that Rule 34 does.
9525.0295 Subp 5.	License holder and program staff must participate in discharge planning and follow-up, and persons providing follow-up must: provide a summary of current status and progress, review and make modification recommendations for the ISP, assist in developing an interim plan, and case manager must be provided copies of specific records.	CFR 483.440 (b)(5)(C)(ii)	Final summary of status must be developed and provided to authorized persons. Post discharge plan must be provided.	Similar	they must provide a copy of the post-discharge plan to authorized persons and they are not required to have any residential program staff in attendance. They are not required to provide the case manager with any records.
9525.0295 Subp 6.	Discharge summary with specific information must be entered in the person's chart within 30 days.	none	none	omitted	
Resident Records 9525.0305 Subpart 1.	Maintain records in ink for three years.	none	none	omitted	none

<u>DHS Rule part</u>	<u>DHS Requirement</u>	<u>CFR Ref. Part</u>	<u>CFR Requirements</u>	<u>Comparison</u>	<u>Comments</u>
9525.0305 Subp 2.	Very specific information to be included in admission records. Also requires an assessment within 30 days of admission.	CFR 483.440 (c)(3,4)	Requires an assessment within the 30 days.	similar	CFR does not address the specific admission information.
9525.0305 Subp 3.	Up to date records including ISP/IHP/PIP, all of the evaluations, quarterly, annuals, health records, etc.	CFR 483.440 (c)(4)(5)(6)(7)	Detailed requirements for IPRs.	similar	CFR does not contain all the specific requirements of R34.
9525.0305 Subp 4.	Person, LAR, commissioner, case manager, and the direct care staff on the unit must have access to relevant information in the record.	CFR 483.440 (c)(7)	everything except the case manager reference.	similar	none
9525.0305 Subp 5.	Releases must be in writing and must contain date of authorization and duration, purpose of the release, what information is to be released, name of person or organization receiving information.	none	none	omitted	CFR requires that they maintain confidentiality of records.
Administration 9525.0315 Subpart 1.	Governing body exercises general direction or comply with CFR 483.410 (A).	CFR 483.410 (a).	Governing body exercises direction of the facility.	Duplicated	None
9525.0315 Subp 2.	License holder insures there is a CEO.	CFR 483.410 (a)(3).	Governing body must appoint the administrator.	Duplicated	none
9525.0315 Subp 3.	Requires compliance with all other applicable laws and rules. Of all those, only Rule 40 is not monitored by another agency.	483.410 (b)	Must be in compliance with all applicable laws and rules.	Duplicated	none

<u>DHS Rule part</u>	<u>DHS Requirement</u>	<u>CFR Reg. Part</u>	<u>CFR Requirements</u>	<u>Comparison</u>	<u>Comments</u>
<u>Written Policies</u> 9525.0325 subpart 1.a.	Develop and implement written policies.	483.450 (a)(1)	Develop and implement written policies	duplicate	none
9525.0325 sub 1.b.	Annually review and update policies and inform person, person's LAR and casemanager of revisions.	none	none	omitted	none
9525.0325 sub 2.a.	Written notice to persons upon admission that there are policies, and what those policies are.	none	none	omitted	none
9525.0325 sub 2.b.	Must provide a copy of the policy governing client rights to the person upon admission.	483.450 (a)(1)(iv)	CFR requires only that policies be available. Not required to provide a copy on admission.	similar	none
9525.0325 sub 2.c.	Must provide copies of policies upon request to governing body, counties and others.	483.450 (a)(1)(iv)	CFR requires only that policies be available. Also similar to 483.420 (a)(1) requiring facilities to inform client and LAR of rules of the facilities.	similar	none
9525.0325 sub 3. a-c.	Required policies: philosophy and goals; service description consistent with need determination; admission and discharge; fees and payment plans; personal policies.	none	none	omitted	none
9525.0325 sub 3.f.	Protection of rights. Specifically references ICF reqs. 483.420 (d), Minnesota Statutes section 144.651.	483.420 (d)	Protection of rights	duplicate	none

<u>DHS Rule part</u>	<u>DHS Requirement</u>	<u>CFR Reg. Part</u>	<u>CFR Requirements</u>	<u>Comparison</u>	<u>Comments</u>
9525.0325 sub 3.g.	Policies for investigating all incidents and taking action.	none	none	omitted	483.420 (a)(2)(3)(4) Do require investigation of abuse and neglect only. ICF reqs require the practice only, not the policy.
9525.0325 sub 3.h.	Handling grievances, including contact persons, time schedule to complain and to respond.	none	none	omitted	483.420 (a)(3) Protection of rights including complaints and due process, but does not require contact persons or time schedules. CFR requires practice but not policy.
9525.0325 sub 3.i.	Description of methods used to elicit participation of person/family in policies and procedures that affect them.	483.450 (a)(1)(i)(2)	Clients must participate in the formulation of policies and procedures.	duplicated	CFR requires the practice, but not the policy
9525.0325 sub 3.j.	Access, collection and dissemination of data.	483.410 (c)(3)	Facility must develop and implement policies and procedures governing the release of any information.	duplicated	none
9525.0325 sub 3.k.	Policy on volunteers.	none	none	omitted	none
9525.0325 sub 3.l.	Policy of use of Psychotropic medications that complies with PMU checklist.	none	none	omitted	483.460 (i) CFR requires review of drugs and administration, but not specific to the review of psychotropic. At the time of the report, the complete ICF checklist was

DHS Rule part	DHS Requirement	CFR Reg. Part	CFR Requirements	Comparison	Comments
<u>Administrative Records</u> 9525.0335 sub A-D, G and I-K	Required administrative records are: id of person receiving services; copy of SLF license; copy of ICF-MR certification; current need determination; organization chart; volunteer records; personnel files. (personnel files have 10 specific requirements).	none	none	omitted	none unavailable and it is unclear how much psychotropics are reviewed. This will require further review.
9525.0335 sub E.	contracts for outside services	483.410 (d)(1)(2)	Must have written agreements with outside service providers.	duplicate	none
9525.0335 sub F.	maintenance of persons records	483.410 (c).	Must develop and maintain separate records for each client.	duplicate	none
9525.0335 sub G.	investigation and recording of incidents	none	none	omitted	We should review, for reasons given above
9525.0335 sub H.	records of fire drills and emergency evacuation drills	483.710 (b)(1)and (1)(iii)	require records be kept.	Duplicated	none
<u>Staffing Requirements</u> 9525.0345 subpart 1.	Staff must be 16+, must communicate in the mode of the person, must be competent to implement the PIP.	483.430 (c)(4)	Requires staff to demonstrate skills necessary to implement IPPs.	similar	Age minimum omitted in CFR. Communication mode is omitted in CFR. CFR duplicates R34 Subp 1(b)(2) regarding competence to implement PIP. We require paper trail, CFR requires outcome

<u>DHS Rule part</u>	<u>DHS Requirement</u>	<u>CFR Reg. Part</u>	<u>CFR Requirements</u>	<u>Comparison</u>	<u>Comments</u>
9525.0345 Subp 2.	Living unit supervisor must have specific qualifications.	none	none	omitted	none
9525.0345 Subp 3.	Licensure, etc. of staff and outside consultants required for professionals providing services.	483.430 (b)(5).	Requires that certain professionals be eligible for a license/certificate in their area of expertise.	Duplicated	none
9525.0345 Subp 4.	Staff ratio requirements as outlined in CFR 483.430 (d).	483.430 (d).	Outline of staff to client ratio requirements	Duplicated	none
9525.0345 Subp 5.	Must employ specially trained staff to meet the needs of people in accordance with their ISP/IHP.	483.430 (c)(4)	Staff must be able to implement program plans for those people for whom they are responsible.	Similar	Rule 34 enforcers are limited in enforcement by the ISP/IHP which is not under our control or the control of the provider. CFR surveys are not so limited.
9525.0345 Subp 6.	Requires presence of a staff person trained in CPR, seizure disorders, first-aid, monitoring side-effects of medication, when this is required in the ISP or the health record. Must be one direct service staff present and accessible whenever clients are present, and there must be a supervisor to coordinate.	483.430 (c)(2,3).	requires competency in responding to medical emergencies.	Similar	none
<u>Staff Training</u>	Requires extensive training and a written training plan	CFR 483.430	Must provide each employee	similar	CFR makes general mention of

<u>DHS Rule part</u>	<u>DHS Requirement</u>	<u>CFR Reg. Part</u>	<u>CFR Requirements</u>	<u>Comparison</u>	<u>Comments</u>
9525.0355	requiring training in specific areas and specific time frames.	(e)(1-4)	with initial and continuant training to perform duties effectively, efficiently, and competently. Must focus on skills directed toward client's needs, must demonstrate skills to manage inappropriate behavior and to implement IPPs.		orientation and training, and makes no specific requirements. However, surveys observe and review outcomes of staff abilities which cover the same subject areas.

ABRM COMPARISON ICF/MR REGULATIONS

DHS Rule part	DHS Requirement	CFR Reg. Part	CFR Requirements	COMPARISON
<u>Licenses</u> 9525.0235	license including: 1. Must not operate a program unless licensed by DHS and by MDH. 2. Must have an approved need determination. 3. Must complete applicant background studies. 4. Must provide administrative records. 5. Must comply with disqualification standards. 6. Must have separate license for each location. 7. Must provide evidence of compliance with other regulatory agencies. 8. Must apply for change in license term. 9. Must give the commissioner access. 10. May request variances to rule parts.	requires that programs be in compliance with all federal, state, and local laws, regulations and codes pertaining to health, safety, and sanitation	Similar	
	CFR 483.410 (b)	Also prohibits employment of persons with convictions or prior employment history of child or client abuse, neglect, or mistreatment		
	CFR 483.420 (g)(1)(iii)	none	n/a	duplicate
<u>Negative Licensing Actions</u> 9525.0243	Commissioner may take negative action against a license if a program fails to comply with the rules and reg.	none		
<u>Program Requirements</u> 9525.0245 Subp 1. Must ensure services in accordance with individual needs as specified in ISP/THP	CFR 483.440 (c)(1)(ii)	requires that programs be designed to meet the client's needs	similar	
9525.0245 Subp 2.b.	Provide training in functional environment including environments used by non-disabled individuals.	CFR 483.420 (e)(11)	facility must ensure clients the opportunity to participate in social, religious, and community group activities	similar but with questions of exactness

DHS Rule part	DHS Requirement	CFR Reg. Part	CFR Requirement	ASRM COMPARISON
9525.0245 Subp 2f.	Use materials, activities and interactions similar to those used by individuals of the same chronological age who are not disabled.	none	n/a	similar; "must" (Rule 34) versus "should" ICF/MR
9525.0245 Subp 4.	Document measures as required by ISP to increase level of participation by person. Measures include staff assistance or supervision, training, and adaptations.	none	n/a	Duplicative
9525.0245 Subp 7.	License holder must document that resources outside the residential program are used in offering ancillary services.	none	n/a	No significant difference

<u>DHS Rule part</u>	<u>DHS Requirement</u>	<u>CFR Reg. Part</u>	<u>CFR Requirement</u>	<u>FARRM COMPARISON</u>
9525.0235 sub 3.	Telephone must be available for personal use	CFR 483.420 (e)(10)	The same except as contraindicated by factors identified in program plan.	No significant difference
9525.0235 sub 4.	May lock exterior doors only for safety, cannot restrict movement or use as a substitute for staff.	none	n/a	No significant difference
<u>Provider Implementation Plan</u>				
9525.0265 1.c.	Plan must be developed within 30 days after admission, and revised annually thereafter.	CFR 483.440 (C)(4) and CFR 483.440 (F)(2)	IDT must prepare IPP 30 days after admission, with specific objectives to meet client's needs. Annually, functional assessment must be reviewed by IDT and updated, as needed.	Duplicative
9525.0265 1.d.	Plan must be in writing and signed by the LAR.	none	none	No significant difference
9525.0265 1.e.	Must provide copy of plan to case manager, LAR within 5 days of development.	none	none	Similar

DHS Rule part	DHS Requirement	CFR Reg. Part	CFR Requirements	ARRT COMPARISON
<u>Physical Environment</u> 9525.0255 subp 1.a.	Says that vocational services and residential services cannot take place in the same location.	none	n/a	none
9525.0255 subp 1.c.	No more than 16 people per living unit.	none	n/a	No significant difference
9525.0255 sub 1.d.	No more than 4 persons per bedroom if licensed before 10/10/89, 2 persons after 10/10/89.	CFR 483.470 (b) (iii)	duplicates the four person requirements but omits the two person.	No significant difference
9525.0255 sub 1.e.	Maintain furnishing and equipment in good repair and similar in appearance to other neighborhood homes.	CFR 483.470 (b)(4)(iv)	requires functional (bedroom) furniture appropriate to the clients needs.	No significant difference
9525.0255 sub 1.f.	provide suitable storage space for personal possessions same as nondisabled person's	CFR 483.470 (c)(2)	Suitable storage space for personal possessions.	No significant difference
9525.0255 sub 1.g.	Must have a kitchen and dining room per living unit after 10/10/89. (each 16 people)	none	n/a	Determination of need (future)
9525.0255 sub 2.	Residence and furnishings adapted to meet sensory, mobility, physical, or behavioral needs, if required in ISP/VHHP.	CFR 483.470 (b)(4)(i)	Functional furniture (bedroom) appropriate to the clients needs.	No significant difference

<u>DHS Rule part</u>	<u>DHS Requirement</u>	<u>CFR Ref. Part</u>	<u>CFR Requirement</u>	<u>ARRA COMPARISON</u>
9525.0265 2.a.	Individual Abuse Prevention Plans (IAPP) and any additional assessments requested by the case manager.	CFR 483.420 (A)(5)	Clients must not be subjected to physical, verbal, sexual, or psychological abuse or punishment.	No significant difference
9525.0265 2.b.	Must provide written summaries of all evaluations and service recommendations to case manager, persons, and LAR.	none	n/a	No significant difference
9525.0265 2.c.	Must advise case manager when additional evaluations are needed, and conduct evaluations, when requested, by the case manager.	none	n/a	omitted
9525.0265 3.b.	PIP must include a baseline skill level for each objective.	none	n/a	No significant difference
9525.0265 3.C.	PIP must include specific methods including info about techniques, physical and social environments, equipment, and materials needed to implement the objective.	CFR 483.440 (C)(5)(i) and (ii)	require methods and schedule of implementation.	No significant difference
9525.0265 3.d.	PIP must include listing of projected starting and completion date for achievement of each objective.	CFR 483.440 (C)(4)(ii)	requires projected completion date, but not starting dates.	No significant difference
9525.0265 3.e.	PIP must include description of types of data and methods and schedule of data collection to measure	CFR 483.440 (5)(iv)	requires type of data and frequency of collection.	No significant difference

DHS Rule part	DHS Requirement	CFR Reg. Part	CFR Requirements	ARRM COMPARISON
	outcome.			
9525.0265 3.g.	PIP must include how plan will be coordinated with other service-providing agencies.	none	n/a	No significant difference
9525.0265 3.h.	PIP must include description of how implementation involves family and friends.	none	n/a	No significant difference
9525.0265 Subpart 4.	PIP must be implemented in accordance with 9525.0265 (refer to that part of this analysis).	none	none	No significant difference
9525.0265 Subpart 5.	Living unit supervisor must review PIP progress monthly.	CFR 483.440 (F)(1)	requires review as necessary by the OMRP (necessary is determined by the facility).	No significant difference--monthly (Rule 34); "as necessary (fed. regs.)
9525.0265 5.B.	must summarize in writing any modifications and directions to staff for implementation of modifications.	none	n/a	No significant difference
9525.0265 5.C.	must sign and date monthly review.	none	n/a	omit monthly review
9525.0265 5.D.	must notify case manager if modified.	none	n/a	No significant difference

DHS Rule part	DHS Requirement	CFR Reg. Part	CFR Requirements	ABRM COMPARISON No significant difference
9525.0265 Subpart 6.	Must provide person or LAR and case manager with a quarterly report containing a summary of data, analysis of data, and evaluation of services provided, sufficient to determine progress as indicated in ISP/IHP and if provision is in accordance with ISP/IHP and must state whether any changes are needed in ISP/IHP.	none	n/a	ABRM COMPARISON No significant difference
9525.0265 Subpart 7.	Must provide case manager with written evaluation of outcomes, copies of evaluations completed, recommendations for changes in ISP and IHP, 30 days prior to the annual review.	CFR 483.440 (f)(2)	requires that the IDT review the assessments annually and updated as needed, and revise the IHP accordingly.	No significant difference
9525.0265 B.B.	License holder must ensure coordination with the case manager, in accordance with the following requirement: within 30 days after IDT meeting, license holder must revise the PTP and implement changes according to IHP.	CFR 483.440 (f)(2)	requires that IHP annually be reviewed and revised as appropriate.	Similar
9525.0265 B.C.	License holder must ensure coordination with the case manager, in accordance with the following requirement: License holder must notify the case manager of significant changes in a persons condition, additional resources needed to implement the PTP, changes in the program that affect the license holders ability to implement the PTP.	none	n/a	No significant difference
Resources 9525.0265 Subp 1.	Each person must have access to their own personal funds, unless restricted by the ISP.	CFR 483.420 (a)(4)	Requires allowing individual clients to manage their own	No significant difference

<u>DHS Rule part</u>	<u>DHS Requirement</u>	<u>CFR Reg. Part</u>	<u>CFR Requirements</u>	<u>ARRM COMPARISON</u>
9525.0285 Subp 3.	If required in the ISP/THP program must assist in the safe-keeping of the money; provide financial statements, limit the amount of cash and valuables retained, and return within 3 days of request.	CFR 483.420 (b)(1) and (b)(2)	Assures complete accounting of funds. Record must be made available on request	No significant difference
9525.0285 Subp 4.	Prohibits financial exploitation and prohibits a program from requiring a person to purchase items reimbursable under Medical Assistance.	none	none	Similar
<u>Admission and Discharge</u> 9525.0295 Subpart 1.	Requires case management approval of placement.	none	none	No significant difference
9525.0295 Subp 2.	Must be written policies and procedures governing discharge.	none	none	No significant difference
9525.0295 Subp 3.	Must be written policies and procedures governing discharge. Allows self-initiated discharge.	none	none	Similar
9525.0295 Subp 4.	Discharge initiated by the license holder is restricted and controlled.	CFR 483.440 (b)(4)	records must show discharge for good cause and provide	Similar

DHS Role part	DHS Requirement	CFR Reg. Part	CFR Requirements	ARRM COMPARISON
9535.0295 Subp 5.	License holder and program staff must participate in discharge planning and follow-up, and persons providing follow-up must provide a summary of current status and progress, review and make modification recommendations for the ISP, assist in developing an interim plan, and case manager must be provided copies of specific records.	CFR 483.440 (b)(5)(iii)	Final summary of status must be developed and provided to authorized persons. Post discharge plan must be provided. reasonable time for transfer.	No significant difference

DHS Rule part	DHS Requirement	CFR Rec. Part	CFR Requirements	ARRM COMPARISON
9525.0295 Subp 6.	Discharge summary with specific information must be entered in the person's chart within 30 days.	none	none	No significant difference
Resident Records 9525.0305 Subpart 1.	Maintain records in lock for three years.	none	none	No significant difference
9525.0305 Subp 2.	Very specific information to be included in admission records. Also requires an assessment within 30 days of admission.	CFR 483.440 (c)(34)	Requires an assessment within the 30 days.	No significant difference

<u>DHS Rule part</u>	<u>DHS Requirement</u>	<u>CFR Reg. Part</u>	<u>CFR Requirements</u>	<u>ARRM COMPARISON</u>
9525.0305 Subp 3.	Up to date records including ISP/IHP/PIP, all of the evaluations , quarters, annuals, health records, etc.	CFR 483.440 (c)(4)(5)(6)(7)	Detailed requirements for IFPs.	Duplicative
9525.0305 Subp 4.	Person, LAR, commissioner, case manager, and the direct care staff on the unit must have access to relevant information in the record.	CFR 483.440 (c)(7)	everything except the case manager reference.	Duplicative
9525.0305 Subp 5.	Releasees must be in writing and must contain date of authorization and duration, purpose of the release, what information is to be released, name of person or organization receiving information.	none	none	No significant difference
9525.0325 sub 1.b.	Annually review and update policies and inform person, person's LAR and casemanager of revisions.	none	none	Similar
9525.0325 sub 2.a.	Written notice to persons upon admission that there are policies, and what those policies are.	none	none	No significant difference
9525.0325 sub 2.b.	Must provide a copy of the policy governing client rights	483.450	CFR requires only that policies	No significant difference

<u>DHS Rule part</u>	<u>DHS Requirement</u>	<u>CFR Reg. Part</u>	<u>CFR Requirement</u>	<u>ARRA COMPARISON</u>
	to the person upon admission.	(a)(1)(iv)	be available. Not required to provide a copy on admission.	
9525.0325 sub 2.c.	Must provide copies of policies upon request to governing body, counties and others.	483.450 (a)(1)(iv)	CFR requires only that policies be available. Also similar to 483.420 (a)(1) requiring facilities to inform client and LAR of rules of the facilities.	No significant difference
9525.0325 sub 3. a-e.	Required policies: philosophy and goals; service description consistent with need determination; admission and discharge; fees and payment plans; personal policies.	none	none	omitted
9525.0325 sub 3.g.	Policies for investigating all incidents and taking action.	none	none	Duplicative; Rule 10 and VA laws impure responsibility of provider
9525.0325 sub 3.h.	Handling grievances, including contact persons, time schedule to complain and to respond.	none	none	No significant difference
9525.0325 sub 3.k.	Policy on volunteers.	none	none	No significant difference
9525.0325 sub 3.l.	Policy of use of Psychotropic medications that complies with PMU checklist.	none	none	Similar

DHS Rule part	DHS Requirement	CFR Reg. Part	CFR Requirements	ARRM COMPARISON
<u>Administrative Records</u> 9525.0335 sub A-D, G and I-K	Required administrative records are: id of person receiving services; copy of SLF license; copy of ICF-MR certification; current need determination; organization chart; volunteer records; personnel files. (personnel files have 10 specific requirements).	none	none	Similar
9525.0335 sub G.	investigation and recording of incidents	none	none	Duplicative
<u>Staffing Requirements</u> 9525.0345 subpart 1.	Staff must be 16 +, must communicate in the mode of the person, must be competent to implement the PTP.	483.430 (c)(4)	Requires staff to demonstrate skills necessary to implement IPPs.	Similar
9525.0345 Subp 2.	Living unit supervisor must have specific qualifications.	none	none	No significant difference
9525.0345 Subp 5.	Must employ specially trained staff to meet the needs of people in accordance with their ISP/IHP.	483.430 (c)(4)	Staff must be able to implement program plans for those people for whom they are responsible.	No significant difference

DHS Rule part	DHS Requirement	CFR Reg. Part	CFR Requirements	ART1 COMPARISON
9525.0343 Subp 6.	Requires presence of a staff person trained in CPR, seizure disorders, first-aid, monitoring side-effects of medication, when this is required in the ISP or the health record. Must be one direct service staff present and accessible whenever clients are present, and there must be a supervisor to coordinate.	483.430 (c)(2.3).	requires competency in responding to medical emergencies.	No significant difference
Staff Training 9525.0355	Requires extensive training and a written training plan requiring training in specific areas and specific time frames.	CFR 483.430 (c)(1-4)	Must provide each employee with initial and continuous training to perform duties effectively, efficiently, and competently. Must focus on skills directed toward client's needs, must demonstrate skills to manage inappropriate behavior and to implement IPPs.	Similar

Report of the Task Force on

Reform of Rules and Regulations
Affecting Services to Persons with
Developmental Disabilities

Appendix VI

Implication of the Use of

Interpretative Guidelines

Under the Administrative Procedures Act

THE ADMINISTRATIVE PROCEDURES ACT AND THE IMPLICATIONS OF DEPARTMENT USE OF INTERPRETATIVE GUIDELINES

Introduction

The task force formed pursuant to Laws of Minnesota 1991, Chapter 318, recommended that the Department of Human Services develop interpretative guidelines for use with its rules and that standards and guidelines should be adopted rather than prescriptive rules. The following is a discussion of the implications and feasibility of this recommendation in terms of: (1) the procedural requirements of the Administrative Procedure Act; (2) legislative delegation of rule-making power to the agency through statutory authority; and (3) the legal force of interpretative guidelines.

I. Procedural Requirements Under the Minnesota Administrative Procedure Act.

The Administrative Procedure Act (APA), Minnesota Statutes, chapter 14, governs all rule making by the Department. The APA defines a "rule" as every agency statement of general applicability and future effect, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure. (Minn. Stat. § 14.02, subd. 4).

The APA requires the department to adopt, amend, suspend, or update its rules in accordance with the procedures specified in Minnesota Statutes, section 14.001 to 14.69. (Minn. Stat. § 14.05, subd. 1). Specifically, some of the major procedural requirements of the APA are:

(1) Rules must be adopted only pursuant to authority delegated to the agency by law and in full compliance with the agency's duties and obligations. (Minn. Stat. § 14.05, subd. 1); (2) Agencies must adopt rules in the form prescribed by the reviser of statutes, setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights of or procedures available to the public. A rule cannot be adopted by the agency unless the revisor

has certified that its form is approved. (Minn. Stat. § 14.06; § 14.07, subd. 2); (3) The agency must publish notice of its action in the State Register and must afford all interested persons an opportunity to submit data or views on the subject of concern in writing or orally. (Minn. Stat. § 14.10); (4) The agency must prepare and make available for public review a statement of need for and reasonableness of the rule. (Minn. Stat. § 14.131); (5) The agency must give notice of a rule hearing at least 30 days prior to the date set for the hearing by publication in the State Register and by mail to those persons registered on the agency list. (Minn. Stat. § 14.14, subd. 1a); (6) The agency must give notice of its intention to adopt a rule without a public hearing by publication in the State Register and by mail to those persons registered on the agency list. The notice must provide for a 30-day comment period. If 25 or more persons submit a written request for a public hearing within the 30-day comment period, a public hearing will be required. (Minn. Stat. § 14.20); and (7) The agency must publish the notice of adoption of the proposed rule in the State Register. (Minn. Stat. § 14.27).

The APA provides that a rule is invalid if it is adopted without compliance with the statutory rule making requirements. (Minn. Stat. § 14.45). It is a general principle of law that all rules must be adopted in accordance with specific notice and comment procedures established by the APA, and failure to comply with the necessary procedures results in the invalidity of the rule. (White Bear Lake Care Center v. Minnesota Dep't, of Pub. Welfare. 319 N.W.2d 7, 9 (Minn. 1982); Wenzel v. Meeker County Welfare Bd.. 3476 N.W.2d 680, 683 (Minn. Ct. App. 1984); St. Otto's Home v. Department of Human Servs.. 437 N.W.2d 35, 43 (Minn. 1989). However, certain rules are exempted from the rule making requirements of the APA. Exempted rules are those that govern internal management of an agency that do not directly affect the public. Since these rules are not included in the definition of a "rule," they are not subject to the requirements of formal rule making. (Minn. Stat. § 14.38, subd. 6(1)).

Interpretative guidelines, by their very nature, are not intended to be a rule. Rather, the function of interpretative guidelines is to provide technical assistance in the form of clarification and explanation regarding the subject matter of the governing rule. Since interpretative guidelines are not subjected to the formal rule making

process and do not meet the requirements of the APA, they do not have the force and effect of law. As noted above, the APA requires that a rule must comply with all procedures of the APA in order to have the force and effect of law. If the desired purpose of interpretative guidelines were that they have the force and effect of law, the guidelines would have to comply with the APA rule making procedures. Further, interpretative guidelines cannot be viewed as exempted rules, since by definition, interpretative guidelines do apply to the public. Since interpretative guidelines do not have the force and effect of law, they could not replace or be used as a substitute for specific statutory mandates requiring the Department to promulgate rules. Therefore, the purpose of interpretative guidelines is limited to a technical assistance tool to be used in addition to the governing rule.

II. Statutory Authority.

In Minnesota, when the Legislature delegates the exercise of discretionary power to administrative agencies, the delegation is allowed only if a clear policy or standard of action has been enunciated by the Legislature. (Anderson v. Commissioner of Hwys., 126 N.W.2d 778 (1964); Lee v. Delmont, 36 N.W.2d 530 (1949)). The Legislature has power to delegate the right to promulgate reasonable rules and regulations necessary to accomplish the purpose for which the agency is created, but the delegation of authority to promulgate rules and regulations does not give the agency the authority to create new substantive law. (Beck, George A., Larry A. Bakken and Thomas R. Muck, Minnesota Administrative Procedure. Butterworth Legal Publishers, 1978, p.7).

The APA expressly requires that agency rule making proceed pursuant to substantive authority delegated by law. (Minn. Stat. § 14.05, subd. 1). Further, it is a basic principle of administrative law that the powers of an administrative agency can only be exercised in the manner prescribed by its legislative authority. (Waller v. Powers Dep't Store, 343 N.W.2d 655, 657 (Minn. 1984)). The authorizing statute dictates the extent of authority granted to the agency. (Frost-Benco Elec. Ass'n. v. Minnesota Pub. Utils. Comm'n., 358 N.W.2d 642 (Minn. 1984)). Therefore, the Department may adopt, amend, suspend,

or repeal a rule only pursuant to authority delegated by law.

Accordingly, a rule is invalid if it conflicts with statute, is inconsistent with the statutory authority pursuant to which it was promulgated, is contrary to the legislative intent, limits the agency's appellate jurisdiction without statutory authorization, or adopts a standard beyond the scope of the agency's authority, express or implied by the Legislature. (Beck, George A., Larry A. Bakken and Thomas R. Muck, Minnesota Administrative Procedure, supra, p.400).

The APA provides that a court shall declare a rule invalid if it finds that it exceeds the statutory authority of the agency. (Minn. Stat, § 14.45). Agencies cannot change the substantive and procedural mandatory portions of a statute, nor can they change existing law or make new law. (Bielke v. American Crystal Sugar Co., 288 N.W. 584, 586 Minn. 1939). Since a rule must be consistent with statutory authority, the rule may neither expand on nor restrict the legislative mandate. If such expansion or restriction occurs, the rule is invalid as lacking the force of law. The requirements and the degree of prescriptiveness set forth in rule, then, are directly related to the authorizing statute. Because the Department is bound by the statutory authority, if the authorizing statute contains specific mandates, an interpretative guideline developed by the Department could not be used to either expand or restrict any such substantive or procedural statutory requirement.

Accordingly, while interpretative guidelines may certainly be a useful tool in the Department's provision of technical assistance, it cannot be said that they would serve to reduce the degree of regulation mandated by statute. Further, since an interpretative guideline does not have the force and effect of law, where a statutory mandate for rule making exists, a rule must be adopted pursuant to the requirements of the APA, notwithstanding the use of an interpretative guideline.

III. The Legal Force of Interpretative Guidelines.

While it has been established that an interpretative guideline does not have the force and effect of law, it has also been indicated that

interpretative guidelines can serve a very useful function as a means of providing technical assistance to those affected by the governing rule. However, the Department's use of policy statements such as interpretative guidelines has significant legal implications which must be carefully considered.

The issuance of policy statements by state agencies has been described as improper or illegal rule making where the appellate courts have discerned a legislative intent to adopt the policy through the APA. (Cable Communications Bd. v. Nor-West Cable Communications Partnership. 356 N.W.2d 658 (Minn. 1984). As discussed above, the most procedurally well-defined method for making department policy is rule making under the APA. The adoption of permanent rules under the APA requires the Department to complete a series of steps that allow for meaningful public input into the substance of the rule being adopted.

The issuance by state agencies of written statements describing the agency's policy outside and apart from the rule making process, has been the focus of considerable judicial as well as legislative examination. Types of statements scrutinized have included interpretative guidelines, among others and the review has been premised on the fact that the issuance of a policy statement by an agency without recourse to APA rule making allows the agency to retain more discretion than if it had adopted a rule for the following reasons:

1. [T]he agency is not required to obtain public input guaranteed by the APA and thus has more latitude to adopt policies of its own choosing.

2. [T]he agency retains greater procedural flexibility by being able to implement, withdraw, or modify its policy statements without an APA proceeding of any type.

3. [T]he agency has greater discretion in whether or not to enforce its policy in every case.

(Beck, George A., Larry A. Bakken and Thomas R. Muck, Minnesota Administrative Procedure, supra, pp.308-309).

The issue of whether state agency guidelines and policy statements actually constitute rules within the meaning of the APA has been addressed a number of times by the Minnesota courts. The Minnesota Supreme Court has characterized the issuance of written policy statements or interpretations of rules or statutes, as "improper" or "illegal" rule making where the Legislature intended the policy making to be governed by the APA. (Cable Communications Board, supra, 356 N.W.2d at 667-68). The following are some of the most significant factors the courts consider in determining whether a policy statement or guideline constitutes improper rule making.

1). Does the guideline fall within the APA definition of "rule?"

The first issue in terms of the legal effect of an interpretative guideline is whether it falls within the definition of "rule" under the APA. This definition is very broad and, as such, policy statements and interpretative guidelines could arguably fall within this definition. However, the APA definition contains an exception for "rules concerning only the internal management of the agency or other agencies and which do not directly affect the rights of or procedure available to the public." The courts have found that some policy statements are simply guidelines for internal management of the agency and, as such, are statutorily excepted from rule making procedures. (Stony Ridge & Carlos View Terrace Ass'n v. Alexander, 353 N.W.2d 700, 703 (Minn. Ct. App. 1984). Further, internal guidelines have been described by the courts as statements that are "so remote from the public as to be exempt" from the rule making process. (Johnson Bros. Wholesale Liquor Co. v. Novak, 295 N.W.2d 238, 242 (Minn. 1980).

2). Is the guideline a permissible interpretation of the rule or statute, or does it constitute improper adoption of a new rule?

In determining whether to develop and distribute interpretative guidelines, the Department must carefully consider the guideline's content in terms of whether it would be viewed by the courts as a permissible interpretation of a rule or statute consistent with its plain meaning, or whether the guideline constitutes the improper adoption of a new rule. In scrutinizing such guidelines, the courts examine how far the interpretation varies from the existing rule or statute. In a

number of cases, the courts have found mere interpretation consistent with the plain meaning of the rule or statute. (See, e.g. Jones v. Minnesota State Bd. of Health. 221 N.W.2d 132 (Minn. 1974); Wacha v. Kandiyohi County Welfare Bd.. 242 N.W. 2d 837 (Minn. 1976); Cable Communications Bd. v. Nor-West Cable Communications Partnership. 356 N.W.2d 658 (Minn. 1984). For example, in Jones, the court held that the agency's interpretation of a rule requiring "practical plumbing experience" to mean actual experience physically installing plumbing systems, was consistent with the rule and its authorizing statute. (221 N.W.2d 132, 134).

In considering whether an agency is merely interpreting a rule, the Supreme Court has held that where the rule is ambiguous and the interpretation advanced by the agency is a long-standing one, the agency is deemed to be interpreting its rule rather than adopting a new rule. (White Bear Lake Care Center v. Minnesota Dep't, of Public Welfare. 319 N.W.2d 7, 8 (Minn. 1982). However, if the interpretation has not been consistently applied in the past, a court may find the interpretation to be an invalid interpretative rule. (Wenzel v. Meeker County Welfare Bd.. 346 N.W.2d 680. 684 (Minn. Ct. App. 1984).

Accordingly, given the legal implications, the content of interpretative guidelines must be carefully considered by the Department. For example, if the Department were to include content in the interpretative guidelines which could be viewed as a new policy, practice or procedure and which is an interpretation that the Department has not historically applied, a court may find this to be outside the scope of the legislative intent and to be an invalid interpretative rule.

3). Is the guideline consistent with its adopted rule?

Where the agency's policy is inconsistent with its adopted rule, the courts have invalidated that policy or interpretation. For example, in Swenson v. State Dep't, of Pub. Welfare, the Minnesota Supreme Court invalidated a department of public welfare decision to reduce developmental achievement center services for persons with mental retardation from five days to three days per week. The rule in question required the services to be provided to all persons who needed them in accordance with an individual service plan. Although

the plaintiffs needed the services five days a week, the department reduced the services to three days a week based on fiscal limitations. The court held that the reduction violated the rule and that any change in the implementation of the rule had to go through the rule making process. (329 N.W.2d 320, 324 (Minn. 1983).

4). Does authorizing legislation direct the Department to adopt rules?

Another significant factor the court considers is whether the authorizing legislation directs the agency to adopt rules through a mandate. If the statute provides that the agency must adopt rules to implement a program, then the establishment of the program outside of rule making will not be permitted. (Insurance Fed'n v. Hatch. 370 N.W.2d 636, 639 (Minn. Ct. App. 1985).

Accordingly, the Department's use of interpretative guidelines would not serve to reduce rule or statutory requirements or prescriptiveness, where they are mandated by statute. Any such reduction in regulation would have to be accomplished through rule making and/or legislation.

5). Does the content of the guideline require public input and participation?

Courts will carefully consider whether the policy issued by the agency required full public input and participation. The APA requires that the Department shall afford all interested persons an opportunity to submit data or view on the subject of concern in writing or orally. (Minn. Stat. § 14.10). This principle was strongly set forth by the Minnesota Supreme Court in Monk & Excelsior v. Minnesota State Bd. of Health, in which the Department of Health cited a policy or practice as grounds for denying a requested review of plans for a new nursing home. In its findings, the court stated:

We feel compelled further to point out that any regulation of the Department of Health referred to by the department in any proceedings are subject to the Administrative Procedure Act, . . . and must be promulgated in accordance with that act. A person dealing with the department is entitled to proper notice of what regulations are being promulgated and are

applicable to him. The purpose of the Administrative Procedure Act is to [e]nsure that we have a government of law and not of men. Under that act, administrative officials are not permitted to act on mere whim, nor their own impulse, however well-intentioned they might be, but must follow due process in their official acts and in the promulgation of rules defining their operations. (225 N.W.2d 821, 825 (Minn. 1975).

Underlying the supreme court's concern that public input is an important element of policy making, is the view that proper notice of new policies or changes in policy is an essential element of due process. (Monk & Excelsior, supra, 225 N.W.2d at 825).

This strong policy of public input is further illustrated by a United States Supreme Court case, Morton v. Ruiz, which held that the federal Administrative Procedure Act (5 U.S.C. §§ 555 et. seq.) was adopted to provide, inter alia, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain state procedures so as to avoid inherently arbitrary nature of unpublished ad hoc determinations. (415 U.S. 199 (1974).

If a court determines that an agency policy or guideline constitute invalid rule making, the policy statement or the guideline itself, may be declared invalid. For example, in Senior Citizen Coalition v. Minnesota Pub. Utils. Comm'n. the Supreme Court held that the Minnesota Public Utilities Commission had no authority to award an intervenor compensation based on a "statement of policy" it had issued in rate cases. Because the policy had not been adopted through the APA, it had no force of law. (355 N.W.2d 295, 303 (Minn. 1984).

IV. Conclusion.

In summary, when there is a legislative mandate for rule making, the Department must proceed with rule making in compliance with the requirements of the APA and consistent with the statutory authority. It has been shown that interpretative guidelines do not have the force of law. Accordingly, interpretative guidelines cannot: (1) substitute for a

rule; (2) expand or restrict the substantive or procedural requirements mandated by the authorizing statute, and (3) contain subject matter inconsistent with the governing rule and statute.

The Department would agree that in some instances, particularly where a governing rule contains complex matter, the use of interpretative guidelines would be a valuable means of providing technical assistance to those affected by the rule. However, the Department must carefully consider the use of interpretative guidelines in light of the following conclusions:

A state agency advancing an important written policy outside of rule making or adjudication, or a private party advocating a particular interpretation of a rule or statute apart from its plain meaning, will face close judicial scrutiny if challenged. An agency must establish that its policy is merely an internal guideline or is consistent with existing law in order to prevail. Matters of obvious public concern and debate seem likely to be deemed rules requiring APA proceedings. Substantial re-interpretations of rules or statutes that result in implementation of a policy in conflict to some degree with the rule or statute will likely be prohibited. A finding of illegal rule making may result in no judicial deference being given to the policy and in a reversal of the agency decision. In some cases, however, the policy may nonetheless be considered as a factor, but without the force of law.

(Beck, George A., Larry A. Bakken and Thomas R. Muck, Minnesota Administrative Procedure. Butterworth Legal Publisher, 1987, p. 316).

Accordingly, while the use of interpretative guidelines may be appropriate as a form of technical assistance, the purpose and content of such guidelines must be strictly limited to explanation and clarification of the governing rule. The content of interpretative guidelines must in no way be inconsistent with the governing law. Therefore, while the use of interpretative guidelines may be a beneficial means of providing assistance to the public, it has not been shown that their use would be an effective means of reducing the degree of prescriptiveness and procedural requirements in rules governing services to persons with developmental disabilities. Rather, any such reduction in regulatory requirements must be accomplished through the rule making process and legislation.